Community Resources

Intellectual Property, International Trade and the Protection of Traditional Knowledge

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To my mum

Declaration of Originality

The work presented in this thesis

(a) has been composed by myself and is, to the best of my knowledge and belief, original and my own, except as acknowledged in the text, and

(b) has not been submitted or accepted previously, and is not being submitted, either in whole or in part, for the award of a degree or diploma at this or any other tertiary education, or for professional qualification.

18 August 2004

Johanna Gibson Date

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Writing a thesis … it remains a firm tradition. A thesis is an exercise in paranoia, social dysfunction, and complete loss of perspective, and yet it is also the most remarkable opportunity.

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Abstract

The protection of traditional and Indigenous cultural production and resources is of critical concern not only to the groups involved but also to the international trading community for which these resources are of increasing economic importance. This thesis examines the basis for "community" approaches to autonomy and legal capacity, the conflict with intellectual property models, the current international discussions towards protection conducted by the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and additional sources for protection at international law (including environmental instruments and human rights frameworks). The thesis asserts that the current emphasis on intellectual property law is an inadequate framework to address the fundamental object of protection for the communities themselves – the management of traditional use, as well as the biological and cultural sustainability of this use. In order to give effect to an international legal model, it is necessary to generalise "community," but this process is countered by the practical emphasis upon the locally specific application of this model. This is achieved through an examination of the commonalities that allow such generalisation which may in turn be adapted at the level of the local community. The thesis recommends *sui generis* protection and sets out a model international framework based on the principle of "community resources" that is developed throughout, recognising the unique claims embodied in traditional knowledge, incorporating customary law, and facilitating community management of resources.

Contents

Introduction: Community Resources: Coming to Terms

> Community is bare, but it is imperative.
>
> Jean-Luc Nancy, *Being Singular Plural*[1]

Indigenous and traditional cultural production and knowledge presents commercial potential in the context of international trade, and particular cultural and social value that is specific to local communities. In the past, the appropriation of that knowledge, deemed "natural" and for the benefit of all, was not necessarily comprehended as creative or personal knowledge, as it were, within the dominant legal and social discourse.[2] However, recently the denial of "ownership" has been refuted and calls have been made for the protection of that knowledge, not only as a matter of property, but more importantly as a matter of intrinsic importance to the dignity and cohesion of traditional and Indigenous communities. Inevitably, those calls seem to resonate within intellectual property systems, informed particularly by the potential value of trade in traditional knowledge.

The international standardisation of intellectual property protection has been criticised as a potentially unjust generalisation of protection, almost inevitably in conflict with local needs.[3] On the one hand, there is what is perceived to be an international course towards the economic analysis and conceptualisation of the resources in this

[1] Nancy (2000): 36.

[2] Gray (1996): 30.

[3] Graham Dutfield notes this conflict between intellectual property regimes in developing and developed countries, and capacity building in developing countries in Dutfield (2003): 29.

knowledge and material, according to a western norm,[4] in what might be understood as a drive towards increasing efficiency, and thus certainty and control in international trade.[5] Intellectual property rights were rendered concerns of international trade in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT),[6] when the World Trade Organization (WTO)[7] was established, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[8] was concluded, acceptance of which is mandatory for any country wishing to be a member of the WTO.[9] The assimilation of traditional knowledge within intellectual property models suggests, therefore, an (implicit) deference to international trade relationships.

On the other hand, the interests of communities in preserving and managing resources on a cohesive local basis, while respecting the global diversity of communities and their self-governance, is at best compromised and at worst rendered impossible under this generalising economy of commodities. This conflict has now escalated into an international discussion towards the resolution of these apparently competing

[4] The globalisation of intellectual property rights has been identified as emphasising the economic analysis of rights, in which a western perspective dominates the international standards. For a discussion of this emphasis in the context of the TRIPS negotiations, see Gervais (2003b).

[5] The drive towards greater efficiency is coupled with notions of increased certainty and risk-management. The notion of "risk" and international regulation of knowledge and information is considered in more detail later and traced throughout this work.

[6] Information on GATT and the GATT Council may be found at http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm.

[7] More detail of the WTO is available at the web-site http://www.wto.org/english/thewto_e/thewto_e.htm.

[8] The text of TRIPS may be found at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[9] Thus, intellectual property rights and enforcement continue to be an important part of the ongoing trade rounds of the WTO, particularly in the Ministerial Declaration of the Fourth Session, adopted on 14 November 2001, in Doha (Doha Declaration): WT/MIN(01)/DEC/1 (20 November 2001). The Doha Declaration was adopted with the mandate to address a variety of issues concerning international trade and economic development, including the marginalisation of least developed countries. Negotiations take place within the Trade Negotiations Committee and its subsidiaries, with other work occurring within WTO councils and committees, including the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) discussed later in Chapter 4, and see also Chapter 6. See also footnotes 9 and 10 below. The text of the Declaration may be found at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

interests, formally under the administration of the World Intellectual Property Organization's (WIPO)[10] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[11]

The IGC is specifically assigned the task of looking at the intellectual property aspects of access and traditional knowledge, in the context of international instruments, national laws of member states, and current debate over balancing interests between commercialising traditional knowledge, on the one hand, and protecting it against commercialisation, on the other. But are these two sets of interests really in genuine competition as such? Broadly speaking, the system of intellectual property protection, exploitation, dissemination and commercialisation is increasingly founded upon an economic analysis of reward, personal control, and commercial agreement, as it were, between the right-holder and the society at large.[12] On the other hand, adequate protection of traditional knowledge is not necessarily compatible with requirements of dissemination but rather, depends upon restriction of access, ideally regulated through the free and prior informed consent of the community according to its shared values and relationship to the knowledge in question.[13]

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[10] WIPO was established in 1967 with the task of the administration of intellectual property treaties and conventions signed by member nations.

[11] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), was established in the 26th (12th Extraordinary Session) of the WIPO General Assembly, held in Geneva, 25 September to 3 October 2000 to consider and advise on appropriate actions concerning the economic and cultural significance of tradition-based creations, and the issues of conservation, management, sustainable use, and sharing of the benefits from the use of genetic resources and traditional knowledge, as well as the enforcement of rights to traditional knowledge and folklore. The text of this Session can be found at http://www.wipo.org/eng/document/govbody/wo_gb_ga/pdf/ga26_6.pdf.

[12] See the analysis in Dutfield (2003): Chapter 2.

[13] The significance of prior informed consent was identified in the important Final Report of the Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy*, Chapter 4. This fundamental principle will be examined throughout towards understanding its operation within the model proposed in Chapter 9.

To date most applications of protection have been merely defensive, through exclusions from the creation of intellectual property,[14] without recognising community authority with respect to the way in which that knowledge is accessed, disseminated, and used. A key concern is that while traditional knowledge is presumed to be sacred and cultural knowledge, for which certain "exclusions" from intellectual property protection would be adequate,[15] this kind of defensive archiving and "safeguarding" continues the historical and classical anthropological effect[16] upon Indigenous and traditional communities, documenting knowledge as a kind of "ethnographic present,"[17] but not facilitating community autonomy with respect to that knowledge. While defensive approaches are an aspect of mechanisms of protection, they

[14] Examples of defensive mechanisms include moves towards the documentation of traditional knowledge, for example, to assist its recognition as prior art (see the discussion in Chapter 4 of the developments in international patent classification tools for traditional knowledge, as part of the discussions of the Special Union for the International Patent Classification), the exclusion from trade mark registration of marks likely to cause cultural offence (for instance, the specific application of trade mark law in New Zealand, as discussed in Chapter 4), and certification marks. For a discussion of authenticity and certification marks in the Australian context, see Wiseman (2001); Gough (2000); Wiseman (2000); Wells (1996b); Golvan & Wollner (1991). Defensive mechanisms form a major part of discussions in the IGC, and will continue to do so in the forthcoming Seventh Session (discussed further in Chapter 4). Similarly, the recent United Nations Development Programme (UNDP) Human Development Report also unreservedly recommends documentation, maintaining that it is frequently essential to achieve protection and "does not prejudice rights": UNDP (2004): 95. However, documentation is not unproblematic in its application as Chapter 4, in particular, will consider.

[15] The basis of this approach is the argument that cultural symbols would be appropriately protected through recognition as "national" emblems or royal insignia, and thus excluded from trade mark registration. For example, the Zia Indians of New Mexico sought to make symbols unable to be trademarked: Lopez (1999). However, this approach fails to capture a broad quantity of knowledge (words, for example) as well as ignores the fact that communities wish to retain (and should be entitled to do so) the right to license material where appropriate (as became apparent to the Zia Indians). Ignoring this right continues the presumption that traditional knowledge is historical and "antiquated" knowledge in the public domain. Protection therefore proceeds from the notion of preservation of that history, rather than genuine recognition of customary management by living communities.

[16] This is of course with reference, in particular, to 19th-century anthropology and the perceived relationship with colonial efforts, as distinct from recent critical anthropology which seeks to problematise and dismantle dominant relationships between the privileged anthropological eye and the natural, organic, anthropological object. For instance, see the work of critical anthropologists, including Clifford Geertz, James Clifford, Marilyn Strathern, and Vered Amit. In particular, see Strathern (1999); Geertz (1973); Geertz (1983); Clifford (1986): 98-121; Amit & Rapport (2002). See also the concerns with the relationship between imperialist endeavour and anthropology in Masolo (1994) and Mudimbe (1988).

[17] Note James Clifford's comments on the tendency of early anthropology to presume and idealise an "ethnographic present" as "a static, pre-contact, traditional culture," in Clifford (2003): 9.

are nevertheless paternalistic and persistent in the historicising of the value of knowledge. Repeatedly implied in this approach is an informal distinction between the validation of conventional knowledge production and the invalidation of community resources through the denial of full governance with respect to that knowledge. Such governance may include commercialisation and licensing where compatible with the shared values of community, suggesting that intellectual property must not be disregarded completely, but must be understood in the context of an adequate and relevant characterisation of community resources. In other words, "traditional knowledge" is "historical" for the purposes of anthropological record, but the community must begin to realise "authority" over that knowledge other than as an anthropological object itself. The community, therefore, gains no access to the politico-legal sphere in the current framework, such access being critical to effective local autonomy and of major importance to the present discussion.

It will become clear in this work that an effective realisation of "community resources" will depend upon the efficacy of the concept at international law, and its acceptance will follow the equitable balancing of interests that characterises the application of international legal principles. Indeed, international intellectual property law proposes a balance that is explicit in the TRIPS Agreement,[18] whether or not that balance is being achieved.[19] What do the interests, of what are importantly diverse Indigenous and traditional communities, have in common in order to justify the construction of the

[18] Article 7, "Obligations," provides that protection should be achieved "in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Full text available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[19] In a recent presentation, Lawrence Lessig argued that current debates regarding the implementation of TRIPS standards and the implications for developing countries can be understood in terms of the need to return to the question of balance that is built into the TRIPS Agreement. Lessig (2004b).

solution as a balancing[20] of competing interests?[21] This balancing principle was set out in the initial documents of the IGC which stated:

> The equity of intellectual property rights is discussed not only in the balance between the rights of the creator and society as the user of his creation, but also in the balance of rights between the creator and society as the provider of heritage resources which he utilizes in his creation. This is the case especially where the provider has conserved the common heritage for generations under in-situ conditions, i.e. in the surroundings where the resource developed its distinctive properties. This principle concerning the equity of intellectual property is now applied in the discussions on genetic resources, traditional knowledge and folklore.[22]

Arguably, the means by which this resolution is sought serves merely to protract the problem, in that the subject-matter of protection continues to be interpreted as one of property, and in particular, intellectual property. Furthermore, in polarising the interests in this "balance" between traditional knowledge and commercial private interests, private intellectual property concerns continue to be vested with economic, commercial, rational, and broader social worth, while traditional knowledge carries with it notions of the natural, non-commercial, common heritage of sharing and history,[23] without

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[20] This solution is understood according to the equitable principle of balancing interests at international law, which will become important to the ultimate proposals in this work, which suggest a consideration of proportionality and balancing harm.

[21] The rhetoric of "balance" occurs throughout the literature: in particular, see Steiner C (1998). In recent presentations, Lessig has made similar calls for a renewed respect for such balance (2004b). This rhetoric betrays a conceptual commonality with arguments in rights to land, as well as arguments about the balance between users and producers. In other words, culture is presented as a kind of finite exclusive right that will intrude upon the private economic rights in inexhaustible intellectual property. The notion of "balancing" interests between restriction of knowledge (right-holders) and its dissemination (users) is also seen within the WTO. In its introduction to the TRIPS Agreement, the WTO site explains that "it should also be noted that the exclusive rights given are generally subject to a number of limitations and exceptions, aimed at fine-tuning the balance that has to be found between the legitimate interests of right holders and of users": http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm. See the statements of the IGC in the Third Session, Final Report on National Experiences with the Legal Protection of Folklore WIPO/GRTKF/IC/3/10 (25 March 2002): 34. See also Annex 1: 13.

[22] WIPO/GRTKF/IC/1/3 (16 March 2001): 4.

[23] Odek explains that traditional knowledge is constructed as lowly "common heritage," while "European creative genius" bestows upon that 'common heritage,' as it were, "the exalted status of 'property'": Odek (1994): 155.

negotiating the fundamental incompatibilities, such as issues of access and commercialisation.[24]

The protection of these resources towards a fair and equitable recognition of community interests is presumed by the IGC to be necessary, but the fundamental nature or quality of that protection is problematically conflated with those economic interests of the outside exploitation of the resources.[25] That is, discussions of the appropriate means by which to protect such interests have been dominated by this adherence to the efficiency of an international intellectual property model for those seeking access to traditional knowledge. Further, this occurs frequently without concern for the need to achieve effective recognition of communities themselves to manage resources internally, including accessing commercialisation of those resources:

> Many of those involved in these issues consider matters of genetic resources, traditional knowledge and folklore to be linked to the laws and practices covering intellectual property use and protection. Indeed, there is already some overlap between the intellectual property system and more "informal" means of protection in these areas. For these reasons WIPO is working closely with its member States to clarify the intellectual property dimensions of these subjects.[26]

This might suggest that a multi-dimensional approach is necessary, with the WIPO discussions of intellectual property being merely one element of the necessary response to traditional knowledge protection.[27] However, to date the concerns have been dominated by intellectual property, reducing or

[24] For a useful outline of some fundamental conflicts between traditional knowledge and intellectual property protection, see Coombe (2001): 275; Barron (2002); Mugabe et al (2001). This problematic is discussed in detail in Chapters 2 and 3.

[25] See the discussion of the globalisation of intellectual property laws and the interests of developing countries in Pretorius (2002); Sell (2003); Dutfield (2003): 195-205 in particular. See also Drahos & Braithwaite (2002).

[26] WIPO. Emerging Issues in IP. Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. http://www.wipo.int/about-ip/en/studies/publications/genetic_resources.htm#.

[27] Yu (2003).

simplifying the difference and dissent in knowledge production and community values to that of "information" in trade, to the extent that the specific value in that knowledge is not necessarily apparent or realised by this kind of framework. Indeed, the construction of knowledge[28] within the framework of international trade has been rejected by some, arguing that these are issues best defined democratically by societies themselves rather than defined through the TRIPS Agreement as intellectual property.[29] In particular, the recognition of the social and community worth in cultural diversity and community integrity[30] is not necessarily, or indeed necessary, within the ambit of such a model.

It must be questioned whether intellectual property frameworks can conceive of the true subject matter, or whether such assimilation of traditional knowledge within intellectual property discourse unavoidably and problematically translates the meaning of the subject matter and the objectives of protection to conform with that framework.[31] Indeed, the question must be asked whether the protection against misappropriation of traditional knowledge can be realistically achieved through a system that facilitates and ultimately legitimates that very misappropriation of the traditional knowledge of communities in the first place, through intellectual property protection of

[28] Specifically this refers to the construction of knowledge, as distinct from commodified information. This distinction is introduced later in this chapter and considered in more detail in Chapter 2. Broadly speaking, it indicates an incompatibility between the communal relationships to shared knowledge, and the implied understanding and communication in that knowledge, as distinct from a necessary abbreviation of meaning through the commodification of knowledge as information for trade.

[29] Shiva (2004).

[30] These principles are examined in Chapter 1, where the basis for community resources as the subject matter of protection is set out.

[31] As later discussions will show, this translation is necessary for intellectual property law, and not just merely inevitable.

the "spoils" and through institutionalised blindness to the process. Intellectual property laws make the misappropriation possible, by judging traditional knowledge according to criteria that make its protection unlikely, and by creating exclusive rights in the works derived, despite the ethical questions that may be raised about the way in which that "intellectual property" was created. Intellectual property is indeed the means by which much of this misappropriation is validated. Can traditional knowledge protection, as end, justify these means and can these means ever really achieve adequate, appropriate, and relevant solutions?

Indigenous and traditional communities are often opposed to the assimilation of their knowledge within intellectual property models:

> We know the current proliferation of debate regarding the protection of traditional knowledge and genetic resources that is taking place in various UN fora is centered on mechanisms for exploitation, not protection. These discussions focus on the use of Western Intellectual Property Rights to be used as the mechanisms for the protection of Indigenous knowledge. These mechanisms are not only inadequate, but dangerous.
>
> Indigenous peoples who have participated in the CBD, WIPO, and other UN processes, have consistently asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and biological resources. Those who wish to impose intellectual property rights over our traditional knowledge and resources, if successful, will transform our knowledge and resources into individually owned, alienable commodities, subject to IPR protection for a short period of time.[32]

Indigenous groups have rejected these constructions imposed upon their knowledge resources, and have called for *sui generis* protection that recognises the customary laws of communities[33] and the need for traditional

[32] IPCB (2004b). Collective Statement of Indigenous Peoples on the Protection of Indigenous Knowledge. UN Permanent Forum on Indigenous Issues. Third Session, New York, 10-21 May 2004. Agenda item 49(e): Culture.

[33] Critical to the model ultimately proposed is the customary law of communities. Referred to throughout this work, use of the phrase "customary law" will indicate the laws of custom of traditional and Indigenous communities, as distinct from customary international law. Customary law is the

management of the unique quality, relationships, and values embedded in those resources:

> We ask the Permanent Forum to intervene in the various UN fora to ensure that truly sui generis systems of protection of Indigenous peoples are protected. These sui generis systems are based on our customary laws and traditional practices. Our existing protection systems are legitimate on their own right and any new mechanisms for protection, preservation and maintenance of traditional knowledge and associated biological resources must respect and be complementary to such existing systems and not undermine or replace them.[34]

For instance, copyright protection may not apply to traditional knowledge where the material is deemed unoriginal and in the public domain, or where the misappropriation is a legitimate adaptation under copyright law. Nevertheless, this may constitute an offensive taking from the community in question through the inappropriate use of cultural symbols, dress, and artistic methods.[35] The equivalent of patent protection is unlikely because of the problems associated with fulfilling requirements of novelty and inventiveness, but the patenting of material derived from traditional knowledge in medicines and plants is possible by virtue of the failure to fulfil these very same criteria. Thus traditional knowledge may be "patentable," as it were, without any requirement to disclose the origin or to provide attribution to the community,[36]

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inviolable and integral law of a community established over the history of that community, critical to its identity, binding members of a community, and therefore also identifying and cohering community. Arguably the recognition of the customary laws of Indigenous and traditional communities, as will be established, is the only genuine way in which to achieve community authority with respect to traditional knowledge.

[34] IPCB (2004b).

[35] Owen Morgan provides a useful analysis of the relevance of offence in his discussion of the taking of Māori words and the legislative response in the New Zealand Trade Marks Act 2002: Morgan (2003). See the discussion of cultural offence in WIPO/GRTKF/IC/6/6 (30 November 2003): 24. See also the references to offence caused by the patenting of traditional knowledge in the final report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*. See CIPR (2002): 81-83.

[36] It should be noted that changes to this law are the current subject of discussions in the Union of the International Patent Classification. These changes are designed to take account of traditional knowledge as prior art, and to disclose the origin of the patent and to provide for the revocation of

because of lack of novelty, inventiveness, and because of publication through the "communal"[37] and traditional means by which knowledge is developed in Indigenous and traditional communities. Even current trends[38] towards requiring the disclosure of origins in traditional knowledge misunderstand the critical relationship between the community and its knowledge resources, and the offence and harm caused by the assumption that such taking is fundamentally just.[39] Similarly, trade mark protection is not readily available other than through efforts to "exclude" certain material from trade mark registration.[40] Any efforts within these models (including disclosure of origin in patterns, certification and authenticity marks, and so on) depend upon a presumption of the importance of safeguarding the knowledge as cultural artifact, rather than recognising community and respecting customary law.

"bad" patents where applicable. Efforts to document traditional knowledge in order to prevent "bad" patents will also be examined in Chapter 4, with reference to international patent classification and the IGC Toolkit, WIPO/GRTKF/IC/4/5 (20 October 2002).

[37] The word communal is problematic in that it too suggests that the ownership is somehow uniform. However, later discussion will trouble this notion of "communal" ownership, indicating the importance of the term community resources. Community, as the discussion will show, is not necessarily "communal" in the common sense of the term as an undifferentiated sharing collective, but "communal" in the sense of traditional and Indigenous philosophies of communalism. For instance, see the discussion throughout in Gyekye (1995).

[38] In particular, see the development of protection on an international level in the documents of the WIPO IGC. All documents of the WIPO IGC are available at http://www.wipo.int/tk/en/igc/documents/index.html.

[39] In other words, the taking will occur in the context of scientific progress and the advance of civilisation, and so on, making it appear to be inherently just. Thus, discussions are invariably towards a way to facilitate cooperation with that taking, in the form of traditional knowledge protection. Bruno Latour challenges the way in which scientific discourse draws upon this revolutionary difference between tradition and modern science in Latour (1987): Chapter 6.

[40] Problems persist in relying on exclusions of emblems and symbols, in that these must be fixed and repeatable for protection. Such defensive mechanisms cannot capture methods in cultural expressions (such as dot painting). See also footnote 14. Note the New Zealand approach to trade mark protection in Chapter 4.

Efforts at "protecting" traditional knowledge, as will be discussed,[41] largely presume the objective to be the defence of that knowledge against misappropriation, through safeguarding that knowledge and its origin within an ethic of sharing it as global resource, rather than realising positive rights in traditional knowledge development and management according to the customary law of the community. The *sui generis* system proposed in this work, however, acknowledges the existence and significance of "local" customary law, and the rights of Indigenous and traditional groups to manage resources according to custom within a transnational (as distinct from the "nationalistic" international model) system. While the legitimacy for the recognition of customary law may be located in several international instruments and sources,[42] those instruments operate as distinct perspectives upon a particular issue for Indigenous and traditional peoples,[43] suggesting a delineation of concerns that may not be helpful in the context of community resources. Separate approaches may undermine the potential cooperation within a single international instrument, upon the recognition of Indigenous and traditional community rights to practise their customary law, with regard to all these separately identified and operable issues. The numerous

[41] The conflict with intellectual property systems is examined in detail in Chapter 2, which considers the theoretical basis, Chapter 3, and Chapter 4, which examines current efforts within the WIPO IGC to create an international system of protection.

[42] Regard for customary law is set out in several international instruments, including: the International Labour Organization (ILO) Convention No 169, Article 8; which refers explicitly to customary law, and builds upon the ILO Convention No 107 on Indigenous and Tribal Populations, which makes similar provisions in Article 7. The Right to Self-Determination, examined in more detail in Chapter 8 in this context, is provided for in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 1 of each instrument, the Declaration on the Right to Development in the Preamble, and Articles 1 and 5; the Vienna Declaration on Human Rights and Programme of Action in Article 2. The United Nations Draft Declaration on the Rights of Indigenous Peoples is explicit in Article 9.

[43] The concern with categorising protection in this way occurs throughout the literature. See Mugabe (2001): 11.

instruments distil the concerns of Indigenous and traditional communities according to the taxonomy of issues identified within the international context of development, efficiency, and trade. Therefore, this work maintains that the protection of traditional knowledge, and the concept of community resources, must be realised through a truly multi-dimensional approach to achieving the legitimacy of custom, of which intellectual property in cultural products may be one aspect within customary management of knowledge by communities, as distinct from defining protection according to established criteria of western legal systems.[44]

Rather than presume the priority of (cultural diversity in) the community as the subject matter of protection, this work undertakes an analysis of the justification for community as the organising principle of protection in Chapter 1. In doing so, this chapter establishes the critical basis for the very different subject matter of the rights – that of community resources – that ultimately must be established through *sui generis* legal standards to be applied in an international context. "Community" emphasises cultural diversity and establishes the centrality of the traditional or customary relationship between community members and between the community and its resources as the subject matter for protection. The concept of community resources is developed to overcome the presumption of property and the economic value of information that inheres in such terms as "traditional knowledge." However, community is not to be made the object of formal regulation, but rather the subject of recognition, the site of contestation, of culture. The framework proposed does not set out to characterise particular communities and, indeed, it would be problematic for

[44] The dynamics and actualisation of this *sui generis* system, as developed throughout, are explored in Chapter 9.

this work to do so. The term, community resources, will be developed as a concept of the generative relationships between people and resources, rather than fixed and discrete objects of knowledge (as presumed by intellectual property models of "traditional knowledge"). It is this dynamic and organic relationship, made coherent through cultural practices, knowledge, and resources, for which protection is ultimately sought.

The concept of "ownership" that is central to intellectual property law and enforcement (and thus, the effectiveness or relevance of the rights created by that law) is unavoidable in this discussion. This is despite the fact that intellectual property is not about ownership in the sense of absolute dominion, but about the creation of certain rights to act in a certain way and to limit the actions of others, all in relation to an intellectual product. Nevertheless, this centrality of ownership and property has taken hold, and this chapter examines the tension between owners and creators in relation to this problem.

Ownership, broadly speaking, becomes the "ethical" turning-point of the debate, where traditional communities are effectively marginalised by the application of this concept in intellectual property law, because of an inability to demonstrate ownership according to the criteria laid down by individualistic property laws. Chapter 1 argues that it is inaccurate to claim there is no proprietary system or entitlement, as it were, within Indigenous or traditional communities. To do so is to deny Indigenous and traditional practices and relationships of custodianship. It is to deny the community's right to respect through its knowledge (as culture rather than as an informational commodity) if that community is unable to access and practise traditional systems and customs of custodianship and guardianship of the land, its resources, and its

story. Further, it is to legitimate the exploitation of traditional knowledge as a public resource, while simultaneously facilitating the removal of that knowledge to the private domain of the intellectual property right-holder. As developed later in this work, intellectual property rights are sustained as co-existent rights which may be subject to a community's custodianship in respect of certain resources, but are not pursued as the critical means by which to understand traditional knowledge and to achieve protection.

A community model will not, however, be effective if it persists as an "anthropological," nostalgic, and moralising "protection" of the "traditional" community, as such a conceptualisation could never accommodate or facilitate the continuing evolution and contemporary identity of a particular traditional or Indigenous group.[45] In order to achieve an effective legal subjectivity for the concept of community, and for the particular traditional or Indigenous group, the concept must be able to evolve beyond the physical and historical fixation of community. Chapter 1 argues for the "personality" of community, contained in the relations between individuals rather than the historical identity of the group. It introduces the necessity that this concept of community is given legal effect as a subject within an international framework for protection, a subjectivity founded upon the processes of relations rather than the individualisation of community.

[45] The elements of "time" and "history" are critical to the development of the concepts of "community" and community resources and are examined in detail in Chapter 1, and again in the model proposed in Chapter 9, where the elements towards community are considered. In particular, customary rights are understood in property law to arise prior to subsequent introduction of conventional forms of private property: Harris JW (2001): 102-104. One particular example of the application of this principle was the important decision of the Australian High Court in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, considered further in Chapter 7.

If a particular local community is to have effective *sui generis* rights to protect, manage, and control its traditional knowledge[46] within an international juridical order that gives effect to community resources, then it must be a source of identity to which other "identities" in a civilised society owe obligations. In turn, a community will be recognised as owing reciprocal obligations to those others. In other words, if community is to be given legal effect then it must become the subject of unassailable obligations rather than a mere projection of historical and geographical identity. This work contends that the increasingly privatised world is largely driven by the human rights rhetoric of individualism, and is similarly justified in terms of democratic rights, or "individual" rights. Community, on the other hand, must be understood in terms of mutual obligations and responsibilities, which arise throughout relationships between individuals, and reciprocity between members of that international "community," and between members and the communities themselves. How these "individualising" models can accommodate highly differentiated and diverse communities is a critical issue for this work.

Chapter 2 pursues and rejects the dominant model put forth for protection thus far, that of international intellectual property law. This is developed in the context of the potentially incompatible subject matter described in Chapter 1. Indeed, the result of any attempt to assimilate concepts, such as traditional knowledge, folklore, and genetic resources, within an intellectual property model is incoherent and unjust. This chapter examines the "universal" appeal

[46] The term, "traditional knowledge," is used here because what is described in this sentence is an aspect of rights to "community resources," but is not synonymous with the concept of community resources, as will become clear in subsequent discussion.

of intellectual property, and challenges its seeming hold as the logical and commonsensical approach to protection.

Intellectual property operates as a kind of grand narrative of innovation,[47] rendering international trade more efficient and productive, towards minimising risk and achieving greater certainty and control. In the context of international trade, it is anti-social and senseless[48] to suggest otherwise than the reasonableness of intellectual property. As enlightened modern individuals, we are literally left without reason to do so, and indeed, constructing innovation outside intellectual property frameworks becomes "unthinkable." This chapter maintains that the institutional and international authorisation and legitimation of Intellectual Property,[49] accredited as culture, knowledge, and progress, must be approached critically and problematised as a means by which to protect that which is inconceivable within economic norms. It considers the way in which intellectual property, innovation, and production have been assembled as a discourse of progress, within which the diversity of traditional knowledge must cede to the efficiency of the management of information and the market.

[47] Grand narratives are those that are institutionalised and legitimated as reasonable, sensible, and commonsensical, so much so that to question their stability and relevance is simply unreasonable and without sense. See Lyotard (1984). These grand narratives, seemingly ideal for understanding and representing the world, producing certainty and control over knowledge, are in fact "impossible," as it were, and their guise of perfection is fractured by the intrusion of the "minor" narratives, where knowledge is diverse, localised, and not generalised. This legitimation of the narrative of intellectual property law is discussed in more detail in Chapter 2.

[48] See Sell (1999), and her observations of the institutional role of intellectual property lawyers in sustaining the framework of private property rights: 174-75.

[49] That is, intellectual property is granted the authorial status, or authority, over the problem. The privileging of intellectual property models and of intellectual property lawyers as "authors," or the sources of the "meaning" of the problem, is described by Sell (1999), where IP is seemingly "evangelised" by its institutional frameworks: "IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy." (174).

The way in which these constraints impact upon the translation of traditional knowledge within intellectual property law is examined in Chapter 3. This chapter is by no means an exhaustive compendium of the conflict between systems of intellectual property and traditional knowledge,[50] a categorising enterprise beyond the physical scope of this work. Nevertheless, Chapter 3 draws upon selected examples to illustrate particular aspects of the critical analysis of community resources in this context.

Chapter 4 examines the current international discussions, proceeding under the administration of WIPO, and therefore upon the platform of international intellectual property law, towards achieving international protection for traditional knowledge. In this chapter, selected national responses to protection are also considered.

Chapter 5 examines further the efficacy of intellectual property law with respect to strategic responses to intellectual property laws in the form of attempts to adapt intellectual property models to systems based upon open access and "freedom," including open source software and biotechnology, collaborative scientific research models, and models of open access to resources. This chapter addresses other contexts in which the notion of "community" is applied, including software communities, scientific communities, and other "traditions"; where effort and expression is inter-personal and inter-subjective, rather than linear and authored. In these circumstances, identity and relationships are problematically mediated, translated, and fractured if

[50] This is accomplished elsewhere in foundational works dealing comprehensively with the interaction between intellectual property laws and traditional knowledge. In particular, see the important work by Posey & Dutfield (1996). For the relationship between intellectual property, biodiversity, and traditional knowledge, see Dutfield (2000); and the essays in the edited collections, Drahos & Blakeney (2001); Blakeney M (1999); Swanson TM (1998). See also the comprehensive WIPO commissioned report, produced by Indigenous Australian lawyer Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (2003), on access to intellectual property protection of traditional cultural expressions in the Australian context.

conventional ownership is valued, rather than optional or external as suggested by individual proprietary models. Nevertheless, the models arising from these sources are "adaptations" at best and fail to negotiate the necessary exclusions sought by Indigenous and traditional groups.

The logic and adequacy of negotiations undertaken with deference to intellectual property must be examined, given the uneasy relationship between traditional knowledge, community, and intellectual property. The chapters on intellectual property law signal the relevance of related Conventions and international bodies, as indeed do the WIPO IGC discussions themselves, and the model developed in this work necessarily proceeds upon several platforms. To that end biodiversity, rights to land, and human rights are necessarily examined in preparation for that discussion.

In particular, biodiversity is given further consideration in Chapter 6. The problem with exclusion, access, and benefit continues to be considered in this chapter, where international obligations to biodiversity are examined for potential frameworks for protection, and the efficacy of models of access and benefit-sharing and the relevance and adequacy of these to traditional and Indigenous groups are considered. The relationship between biodiversity, traditional knowledge, and trade is also examined in the context of the Doha Development Agenda,[51] and the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD).[52] Potential

[51] Material on the Doha Ministerial Conference can be found on the WTO site at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm. The text of the Declaration is available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[52] The CBD was adopted at the 1992 Earth Summit in Rio de Janeiro and is administered by the United Nations Environment Programme (UNEP). The text of the CBD is available at http://www.biodiv.org/doc/legal/cbd-en.pdf.

authority for traditional knowledge protection is also considered in the discourses of rights to land and human rights, in Chapters 7 and 8 respectively.[53]

Ultimately, however, in attempting to describe a system of protection that could encourage international acceptance and application, the creation of standards of community entitlement, practice, and management risks summarising and generalising what are necessarily unique community systems of custodianship, management and integrity. This generalisation is necessary as a starting-point in order that the principles of protection may be applied to any particular regime, but in no way is this to be interpreted as a formalisation of customary law and communities. While this process raises specific difficulties and concerns, it is nevertheless necessary to generalise or at least to identify what common features there may be, so that any possibility for a model can be devised. In order to achieve relevant and appropriate models of protection through which communities can adapt and realise systems of governance, it is necessary to translate the theoretical basis for protection into a workable legal doctrine. While this process must never overcome the heterogeneity of the interests identified, it is a critical strategy if any certainty and international acceptance of the template of community resources for the protection of these diverse interests is to be achieved, and the diversification of "minor" laws[54] is to be realised in a global trade environment.

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[53] Inevitably, discussions of community must take account of debates in human rights, and cultural and collective rights. This work argues that a conceptualisation of community must be built, rather than rely, upon these responses, which tend towards political location and historicisation without providing an adequate framework for the special kinds of questions raised by Indigenous and traditional resources.

[54] This concept of "minor" laws is derived from the work of Félix Guattari and Gilles Deleuze on the notion of "minor" literatures (and minor science) as interruptions to the grand narratives of institutionalised and legitimated reason and big/major science. For instance, see Deleuze & Guattari (1986). See also the discussion in *A Thousand Plateaus*, which considers the distinction between

The model presented in Chapter 9 depends upon recognition of the aspects common to communities, such that community resources can be conceptualised, not so as to limit the subject matter but so as to enable application. While it is critical to recognise and acknowledge the diversity and heterogeneity of interests of Indigenous populations and traditional groups, any coherent attempt to address and facilitate meaningful protection of their cultural production and resources must suggest some sort of relevant commonality for the systematic basis of that attempt.

In preparation for the model proposed in Chapter 9, the way in which this commonality emerges is introduced here, and traced throughout this work. Fundamentally, that commonality emerges in three ways. First, and of fundamental importance, there is a number of interests, any one, combination or all of which, at a certain level of abstraction, can be traced as common to all groups. These include interests of cultural and social integrity and indeed dignity, cultural identity, and political and economic interests. Crucially, as will be established in the following chapter, the inextricable relationship between community and its resources is integral to the maintenance of community integrity, of collective subjectivity, and the attainment of individual personhood by virtue of the communal production of social worth. This relationship will be shown to be compromised by the process in intellectual property law of the alienation of knowledge, as information, from the communities for which that knowledge is critical.[55]

"nomad science" and royal or state science, which asserts a rational, legislative, and institutional primacy: Deleuze & Guattari (1987): 367. Nomad science is characterised by a different organisation of work and "expression" from that of the linear models of institutional science: (1987): 369.

[55] Janke (2001).

Second, and related particularly to the economic construction and comprehension of interests in these resources, there are common elements in the very exploitation of these resources, in their removal, exhaustion (through physical and cultural transformation), and their privatisation. The appropriation of Indigenous and traditional knowledge and resources (whether referred to as traditional knowledge, folklore, natural resources, environmental knowledge, and so on) usually involves the physical removal, through actual harvesting or through the adaptation of methods and knowledge to other products, such that those resources become commodified as goods of international economic value. Such removal may also be effected through the cultural transformation of the knowledge, through offensive use and reproduction, fracturing the relationship between community and resources (and indeed individuals and community).[56] This process of appropriation is premised upon and motivated by the prior assumptions of these resources as separate and tangible goods, of community as communal, of traditional knowledge as a common heritage. In other words, the process is legitimated by these presumptions and the traditional knowledge identified as public resources for trade and commercial exploitation.

Finally, there are common issues in the facilitation and protection of that exploitative process and the means by which the resources are translated into goods of international economic value, where rights are created without reference to production (and the ethical or otherwise nature of that production), only with reference to dissemination (that is, the trade and

[56] For instance, elders in communities have described the impact of offensive use on the self-worth and self-identity of young people in the community: Ahren (2004). See further Chapters 1-3.

commercialisation of those products). Intellectual property systems, and the principles of protection underlying those systems, suggest that appropriation is drawn from a common heritage of ideas. How those ideas are transformed into products in which intellectual property may subsist is not regulated or restricted. While the products must fulfil certain criteria, the ethical circumstances of their production do not. Therefore, intellectual property systems not only encompass the usual rhetoric of rewards, but also the rhetoric by which to understand whether intellectual property is at stake at all; that is, whether creativity, invention, or otherwise may be claimed. Thus, attempts to protect community resources (as embodied in concepts such as traditional knowledge or traditional expressions of culture) within intellectual property systems means that knowledge is presumed to fulfil intent (authorial and personal) and possession (limitation and control), without acknowledging processes of community and belonging that might be inextricable from that knowledge.

Developing this level of abstraction facilitates the concept of community that is given legal efficacy in the model put forth, where possibilities for legal authority to vest in the "community" are considered, bearing in mind the significance of communal "use."[57] If an international harmonised model is to be relevant both to local communities and to international trade, it must also be based upon the recognition of the authority and capacity of "community." The concept of "community" enables a consideration of the subject matter of protection beyond the possessory operation attended to by individualistic

[57] Nevertheless, "identifiability" of community is relevant to the application of community resources, as will become clearer in Chapter 9.

intellectual property regimes. This chapter is assisted by the arguments of Chapters 2 through to 8, which establish that a model based upon exclusory private or individual rights and upon the normative, organising principle of the self-possessing, ambitious individual (as in international intellectual property law and the emphasis on the source, origin, and manufactured in-imitativeness[58] of commodified information) will never be able to account for the diversity of meaning in "ownership" or "custodianship" that must be enlivened if fair and equitable recognition is to be achieved; this is arguably impossible unless rights to customary governance are recognised.

Finally, the various streams of community are drawn together so that concrete recommendations in the context of a global international framework of protection are made. The legitimacy of an international system incorporating customary law is considered, and the particularity of the model established. This chapter sets out the parameters for community and community resources, and presents a detailed system of recommendations and applications.

Ultimately, adequate protection requires a system that creates rights in the community to use and manage its resources, rather than artificially making the product of creativity (individual or otherwise) scarce[59] in respect of granting an owner a monopoly over the discrete material form realised from those resources. Community rights in the process (rather than product alone) of tradition and custom, understood as developing and evolutionary (rather than historicised and ancient), are necessary to ensure knowledge continues on the community's terms. This is not to ignore the potential interest of communities in realising the commercial potential in resources,

[58] The concept of in-imitativeness, together with the concept of origination, will be developed in Chapter 2.

[59] This creation of artificial scarcity is considered in Vaver (1990): 126.

but to understand that commercialisation occurs according to community values and laws.[60]

By vesting authority and originality, as it were, in the community, rather than deploying a system of external "safeguarding" and defence of knowledge, the economic benefits created by intellectual property systems with respect to some knowledge may also be accessed by Indigenous and traditional groups. This balance between the need to protect Indigenous and traditional resources and at the same time provide for remuneration for the use of those resources is necessary to the realisation of effective authority on the part of communities. It is important therefore, that the model proposed does not discredit the interests of communities as "spiritual," "emotional," and so on, making them outside the ambit of the "legitimated" exchanges of international trade. The necessary variable that must be addressed and which may provide the bridge between the protection of tradition and the remuneration for its commodification is the nature of that use. It is the quality of use, to which *sui generis* rights must necessarily refer, such as the importance of consent, where use of a particular knowledge-object may not be exploitative of the community or of the particular knowledge,[61] thus protecting the community against misappropriation of resources and of cultural integrity. Furthermore, it is the possibility of co-existing individual rights to intellectual property and community rights to management of resources that must be considered.

[60] The interests of those outside the community, whether excluded "traditional" persons or non-traditional interests, may be understood in terms of equitable principles of balancing those interests, as considered in detail in Chapter 9.

[61] For instance, in some cases consent to use a symbol, artifact, or knowledge may be granted where that use will not compromise the shared values of community. In other cases, disclosure and dissemination will not be appropriate. In this model, these must be decisions of consent for the community, and not a matter of the regulation of the quality of knowledge by systems external to the community.

Therefore, considering the limitations of conventional intellectual property systems, together with the need to strive towards an optimal, that is, *sui generis* system of rights, this work will develop a framework of recommendations towards community resources. The international harmonised model proposed is based upon the recognition of the authority and capacity of "community" that might otherwise be unrecognised as a subject of the law,[62] but which is an important mechanism for the protection of community resources. This model achieves certainty through the legal process by which a community asserts itself, acceptance through harmonisation of this model with international principles of intellectual property and trade, and substantiation through international principles of reciprocity, community management and custodianship, and cultural and biological diversity.

[62] The principles at international law for qualification as subjects of the law are discussed in Brownlie (2003): 57-67. This question is re-considered in Chapter 9.

Working Definitions

Information and Knowledge

The over-arching object of protection for intellectual property law is "least of all" information.[63] Furthermore, the increasing technological ease with which information can be reproduced motivates the ever-expanding protection of intellectual property as it responds to the technology of copying,[64] arguably without necessarily responding to changes in the technology of protected information or inherent in the objects of knowledge themselves. In other words, the law responds to pressures of the market in order to maintain (indeed protect) the market for information, rather than matters of protection intrinsic to the subject matter itself. The market, in this way, becomes part of the "subject matter" of protection. At the most basic level, therefore, international intellectual property law is increasingly concerned with the economic value (once again) of the information in those resources, and the technologies associated with its dissemination when that information enters the market.[65] Indeed, TRIPS refers not to

[63] That is, information is the abbreviation of knowledge, the lowest common denominator of protection. See Islam (1999): 183. See also the discussions in Drahos (1995) and in particular the comprehensive analysis of the commodification of information, and indeed knowledge, in international standards of intellectual property in Drahos & Braithwaite (2002).

[64] For instance, a major point of discussion towards the TRIPS Agreement was the technology of copying and the trade in counterfeit goods. See the discussion of negotiations leading to the conclusion of TRIPS, where the technology of copying was a key factor towards international standards, in Gervais (2003b). Technologies of copying continue to motivate the ongoing strengthening of intellectual property rights: Boyle (2003): 40-42.

[65] See Dutfield's comments on the way the law follows the technology of reproduction, rather than engaging with the knowledge itself in Dutfield (2003) Chapters 1 and 2. See also Boyle (2003).

property in the physical goods themselves, but in the information,[66] as it is commodified within goods in the global marketplace.[67]

Through the application of intellectual property laws, information is conceptualised as a "finite" and "scarce" resource, in the creation of artificial scarcity and the rhetorical assertions of ownership.[68] Linked to this "scarcity" in the marketplace, is the situating of intellectual property rights as intrinsically bound to international trade (indeed, the "exclusion" of moral rights from Article 9 of TRIPS was justified at first on the basis that they were not "trade-related"[69]). This relationship has encouraged a growing emphasis upon the economic analysis of intellectual property rights, which has come to prevail over the alternative approaches, including the moral rights approach in copyright. The international movement appears to be towards a western economic analysis of rights, away from the continental emphasis on creativity and authorial integrity.[70]

It follows, therefore, that protection of the resources of traditional and Indigenous communities, within an intellectual property model, will invariably focus upon those resources as *information* commodities. Where information is commodified within the efficiency of linear models of innovation and the market in that innovation, knowledge indicates the incremental, shared, and evolutionary model of innovation. The efficiency of the commodification of information is arguably essential to the efficacy of the intellectual property system as currently applied, but potentially

[66] See the critique of the way in which the TRIPS Agreement commodifies knowledge as information that may be restricted and privatised in Drahos & Braithwaite (2002).

[67] The notion of commodities as objects of economic value, and the realisation of value through exchange of commodities is explored in Appadurai (1986b).

[68] Drahos & Braithwaite (2002); Story (2002); Pretorius (2002); Soon (1999).

[69] Gervais (2003b): 124-25

[70] Gervais (2003b): 125.

exhausts the *knowledge* from which that indexical information is extracted, transforming it to the detriment of community identity:

> [T]he commodity context, as a social matter, may bring together actors from quite different cultural systems who share only the most minimal understandings (from the conceptual point of view) about the objects in question and agree *only* about the terms of trade. The so-called silent trade phenomenon is the most obvious example of the minimal fit between the cultural and social dimensions of commodity exchange.[71]

Contrary to this emphasis on commodity exchange and the regulation of trade, the model of community resources developed in this work will maintain a focus upon resources as knowledge; that is, knowledge as part of the cultural and conceptual fabric of the particular community, as distinct from the commodifiable economic bits of information to which it is arguably reduced through the application of intellectual property laws. The application of intellectual property law, through the simplification of creativity and the source of innovation,[72] reduces the meaning of traditional knowledge for the communities involved.

Protection beyond or other than that offered by intellectual property, must be nevertheless managed as a harmonised system of protection, and as one which is internationally applicable. Furthermore, in order to achieve international application, that protection must also be acceptable in the context of international intellectual property law. This is primarily (although not only) because of the ongoing emphasis on the informational value comprised in these resources, and the fact that any system of community resources will of course interfere with the misappropriation of resources that, thus far, has been legitimated by intellectual property regimes.

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[71] Appadurai (1986b): 15.

[72] Discussed further in Chapters 2, 3, and 5, but essentially this occurs through the application of simplified origins of innovation, and the containment of meaning within a work presumed to be discrete, complete, and fixed. Later discussion will develop this in terms of the qualities of origination and in-imitativeness.

However, as suggested in the introductory paragraphs, the objectives for protection are far greater than the economic material at stake, including cultural integrity and identity, social practices, as well as political interests. Indeed, it is perhaps misleading to commence with the object of protection as that of information, or of the resources in which that information vests. This emphasis maintains the link to intellectual property systems, and makes it possible to disconnect those resources, as information, from the communities to which they are inextricably linked. In other words, the quality of *knowledge* must be maintained in a model of community resources as distinct from information economics, where knowledge is apart from *information*, embodied also in the land, in biodiversity, and in the intrinsic communication between individual, community, and locality.

In proposing community as the legal actor in such a system, it is necessary to identify adequate means to protect the community use and management of the resources upon which the conventional, commercial, and privatised products are based. This consideration of knowledge or resources represents an effort to shift the emphasis from that of property and individualised justice in respect of that property, of that possession (of particular goods, particular rights), to that of community in resources (cultural, territorial, and otherwise).

Indigenous or traditional

From the outset, it is important to clarify the use of the terms *traditional* or *Indigenous*, and to be aware that these are not necessarily interchangeable. Thus, while Indigenous knowledge may be traditional knowledge, traditional knowledge is not necessarily Indigenous.[73]

[73] Mugabe J et al (2001): 2-3.

The term "Indigenous" maintains a calculation and categorisation of the subject matter in deference to, or because of, colonisation. Indeed, conventional conceptualisations of the right to self-determination, as discussed in Chapter 8, risk defining themselves upon the basis of decolonisation and the collective, without exacting a political voice for traditional and Indigenous groups in and of themselves:

> The term "indigenous" is itself conceptually based around the relation of the original population to that of their colonizers. The construction of an indigenous identity can in one sense be understood as a reaction to the historical projection of the Indian as the "other", subjected to policies of assimilation or eradication. The distinctive criteria for indigenous populations are therefore primordialism and cultural difference.[74]

The identification of Indigenous groups may be particularly problematic in cases such as the Romani people,[75] who may go unrecognised despite traditional experiences in and expressions of culture. While the Roma may figure differently in discussions of biodiversity and land, it will become clear as the concept is developed in this work, that in a complete picture of community resources and obligations to culture, groups like the Roma must be compatible with the model proposed, and that physical connection to the land should not be a pre-condition for community.[76] Where "Indigenous" is used in this work, it may be in response to its use in a particular

[74] Sieder & Witchell (2001): 205.

[75] Recognition by the United Nations is one external means of determining "indigenousness," although the Roma do not self-identify as Indigenous. They are, however, recognised as Indigenous by the Center for World Indigenous Studies (CWIS), and are included in the CWIS Indigenous Studies Virtual Library http://www.cwis.org/wwwvl/indig-vl.html. See the discussion in Amit & Rapport (2002): 26-41. See further the discussion in the UNDP of the classification of "Indigenous" at http://www.undp.org/csopp/CSO/NewFiles/ipaboutdef.html.

[76] This is contrary to application of native title by the courts, where the connection is understood as a simplistic, physical and potentially rivalrous attachment, rather than the responsibility for continuing the land's story and identity that is expressed in Indigenous philosophies. This is examined is greater detail (together with an analysis of key decisions) in Chapter 7 where the notion of self-recognition or self-identification explored in Chapter 1 is considered with respect to the Australian Aboriginal and Torres Strait Islander Commission (ATSIC) Act. See also Article 2 in the International Labour Organization (ILO) Convention No 169 which states: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." Thus in Chapter 7, it will be seen that physical connection to the land is not necessarily fundamental to the assertion of "territory" by community.

instrument (for example, its use in the CBD) or in response to the conceptualisation of place. However, the term "Indigenous" is retained, coupled with "traditional" and capitalised throughout this work, operating both as a proper noun and as a pre-condition of knowledge and community, rather than a category of knowledge. Thus, the word "Indigenous" is used in the way indicated by its etymology, to refer to the birth or production naturally in a land or region, belonging to the soil or that region, inborn, innate, and native,[77] but not necessarily to confine community to a particular, crowdable, physical place. Indigenous, in this way, indicates the marking of Territory, the belonging, the relationship, as distinct from the limitation of people by and to place as property.[78] That is, the land is where the community stands;[79] the community makes the space of culture. This departure from the connection to physical place is significant for this work, in order to resist the binding or disciplining of culture and the classical anthropological rendering and determination of community as one "Indigenous" voice.[80]

The concept of tradition, which becomes critical to the understanding of the relationship between history, identity, and the legitimacy of claims to community resources,[81] is not to suggest a pre-modern, pre-contact, static, historical community, as might be suggested by some applications of "community."[82] Nevertheless, tradition

[77] *The Oxford English Dictionary*, 2nd ed. Oxford, Clarendon P, 1989.

[78] This is explored in detail in Chapter 7.

[79] Indigenous Australians use the phrase, "One Tribe: Our Land is Where We Stand." See the site of the Lumbu Indigenous Community Foundation at http://www.lumbu.org/.

[80] See the critique of this location and uniformity of the object of study through ethnological and anthropological discourse in Appadurai (1996a). The concept of territory is explored in greater detail in Chapter 7 (rights to land) and further in Chapter 8 (territoriality in the context of human rights).

[81] This concept of tradition and its significance to the coherence of community resources is developed further in Chapter 1.

[82] See in particular the discussion of early sociological approaches to community in Chapter 1, and the specific ramifications for traditional and Indigenous groups in the context of rights to land, considered in Chapter 7.

does suggest stability and integrity that confers legitimacy upon claims to community resources;[83] but this is not to maintain community or its resources within a geographical and historical moment. Rather than a fixing of that identity which might ultimately be diluted and dissipated by modernity,[84] thus inadvertently justifying denial of protection through an erosion of tradition,[85] tradition is understood in this work as the persistence, custodianship, and story, the narration of which occurs according to communal or shared custom, practices, and beliefs, confirming the identity and cohesion of community.[86] "Traditional" therefore refers to knowledge produced, used, and experienced by the community with reference to this narration of stable and persistent tradition and its story, without denying the capacity for community to evolve "traditionally" with respect to expression, innovation, and place.

Where appropriate, the term "community resources" will be deployed (as developed below), emphasising the relationships between community, resources, and individual members, rather than the authenticating attachment to place. The concept will be used throughout to indicate the relationship between community and resources, unless the discussion is referring to knowledge as an object of trade, where it is rendered "information" within intellectual property laws, or where knowledge is referred to as a specific aspect of the resources of community. In these cases, the phrase "traditional knowledge" will be favoured over others (as the term in dominant use in that

[83] Conventional applications of community tend to rely upon physical confirmations of that stability, as in the connection to place discussed in Chapter 7. However, the concept of community resources resists this physical rendition of community and notes "place" to be created through community and indeed this stability of "tradition."

[84] See early sociological accounts, in particular that of Maine (1861).

[85] As suggested by the application of native title law in Australia, as discussed in Chapter 7.

[86] This is not to introduce a problematic and simplistic hierarchy between traditional communities as spiritual and unspoiled, and modern society as in decline, a comparison which merely re-instates the stereotypes of traditional communities as unprogressive, unimaginative, and without innovation. See for instance the application of this opposition in Tönnies (1957).

context).[87] This term will indicate the more limited conceptualisation of knowledge, or the circulation of the term within dominant frameworks, rather than the relationships of cultural identity with which this work is concerned. The concept of community resources, as will be seen, acknowledges the development and evolution of community, without denying traditional knowledge practices through loss of place due to processes of colonialism, dispersal, and alienation.[88]

It is the contention of this work, and the feature of the model of community resources, that a sense of "place"[89] and belonging comes through the practice of community, and not through simplistic geographical indications of groups. Thus, despite the dispersal or displacement of groups, the locale of community cannot be denied through physical separation. This concept is developed from the outset in Chapter 1, where community is considered in detail. While place may be an element of community, it must not preclude protection of traditional knowledge through the model of community resources. Fundamentally, the concept of community resources will be shown to indicate the relationships between traditional and Indigenous groups and resources, beyond the objectification and limitation of models of the "traditional" and "Indigenous" knowledge products.

The progress towards further explanation of community resources will be understood through a consideration of the major terms below.

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[87] See the discussion of terminology in the Third Session of the WIPO IGC: WIPO/GRTKF/IC/3/9 (20 May 2002).

[88] The relationship between place, cultural location, and the integrity of community is examined in Chapter 1. Importantly, modern evolutions of community should not be denied through loss of place. This is not, however, to say that land is not important, but that dispersal and colonisation should not suggest or legitimate loss of community identities. See for instance Fog Olwig (1997).

[89] It will become clear in the next chapter and traced throughout, that place is understood not in the physical, rivalrous, competitive sense of western concepts of property in land, but in the marking of territory through the collective subjectivity of community and cultural practice.

What is "Traditional Knowledge"?

A diverse range of terms for forms of Indigenous or traditional knowledge has been compiled throughout the research literature and international discussions;[90] however, as will become clearer in the discussion below, this work chooses to avoid the taxonomy or categorisation of traditional knowledge that occurs in this way.[91] Nevertheless, the major terms of "folklore" and "traditional knowledge"[92] are considered here, and the limitations of their use described, in order to problematise this apparent "summation" of knowledge under the banner of "traditional knowledge." For the purposes of this work, and in the important and self-conscious departure from "information" and its categories, the term "traditional knowledge" is taken to include all aspects of tradition and knowledge which have the potential for misappropriation, including knowledge embodied in the land and biodiversity. The key to understanding the term is not to sub-categorise it for the purposes of finding intellectual property protection, but to theorise it in terms of the relationship between

[90] This range of operational terms and definitions is usefully collected by the WIPO IGC in the documents of the Third Session. See WIPO/GRTKF/IC/3/9 (20 May 2002).

[91] Many Indigenous and traditional communities are concerned with this practice of delimiting areas of their knowledge according to such definitions:

> Too often, traditional knowledge is incorrectly made parallel only to science. Science is but a small part of non-indigenous knowledge. Similarly, to suggest that traditional knowledge is only the equivalent of science is to diminish incorrectly the strength and breadth of traditional knowledge. Thus, the suggestion that traditional knowledge should be characterized as traditional science diminishes its breadth and value. (Alaska Native Science Commission: http://www.nativescience.org/html/traditional_knowledge.html)

Similarly, the WIPO fact-finding missions Report, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* recognises that traditional knowledge will encompass a diverse range of material. See WIPO FFM (2001): 210-213.

[92] These two terms are identified as the major categories, particularly through their nomination in the title of the WIPO IGC – the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. However, many other self-explanatory categories have been coined including: "Traditional Cultural Expressions," and "Traditional Expressions of Culture," (used usually to indicate folklore); "Traditional Ecological Knowledge," "Traditional Medicinal Knowledge," "Traditional Agricultural Knowledge" (usually indicated by "traditional knowledge"); "Indigenous Intellectual Property"; "Indigenous Cultural Property"; "Indigenous Heritage Rights"; "Cultural Heritage Rights". These are all considered at length in the WIPO IGC document from the Third Session: WIPO/GRTKF/IC/3/9 (20 May 2002).

tradition, knowledge, and community, for the purposes of the concept of community resources.

1. Folklore

The influence of the intellectual property model extends to the imposition of categories upon the species of Indigenous and traditional knowledge, categories which are doubtful in their relevance to these communities themselves. The term folklore is considered here primarily because of its ubiquity in current debates surrounding these issues. It does raise however, some concern in its application because of the implied separation of Indigenous and traditional knowledge along conventional intellectual property categories: that is, industrial or utilitarian (traditional knowledge) and creative (folklore) intellectual property as distinct kinds of production.[93] In other words, traditional knowledge is pre-supposed as approximating industrial property categories in its usefulness or commercial value. Folklore, on the other hand, suggests creative works for which copyright (and the attending celebrity of the author) may be the appropriate protection, while at the same time introducing a problematic association with the ethnographic historicisation of community.[94]

The concept of community resources challenges this distinction, as presuming a kind of commercial or technical utility for certain kinds of knowledge, while misunderstanding the distinct importance and utility of cultural expressions and folklore for community integrity and cohesion. This distinction itself may be understood as being related to the different forms of ownership and exclusive rights

[93] See the discussion of this problematic assimilation of traditional knowledge within intellectual property categories in Barron (2002): 63-69.

[94] That is, referring to the definition of folklore as including the study of the traditional beliefs (*The Oxford English Dictionary*, 2nd ed. Oxford, Clarendon P, 1989), the term has problematic associations with the classical anthropological study of peoples as distinct from living relationships to knowledge.

that attend these different intellectual property rights, and indeed, to the different commercial significance of each category. Therefore, it marks out the cultural "value" of different kinds of knowledge within economic models of intellectual property rather than the realities of value according to community resources and customary law. This distinction is irrelevant to many of the interests of Indigenous and traditional groups that require protection. Indeed, pursuing the distinctions imposed by intellectual property models, and presuming the applicability of western objectives to Indigenous and traditional groups, will continue to over-ride and overlook the way in which biological and technological resources are related to the cultural expression that facilitates the cohesion and integrity of a particular group. Maintaining and proceeding from this distinction reinforces and sustains the primacy of the property model for any subsequent model of protection, while overlooking the commonalities described earlier.

For these reasons, this work does not deploy the taxonomical language of traditional knowledge and folklore, abandoning the term "folklore" except where explicitly used in a particular source. Instead, this work will consider community resources in the particular circumstances in a particular case. Thus, references will be made to artistic expressions, cultural expression, performance, story-telling, medicinal knowledge, agricultural knowledge, ecological and environmental knowledge, ceremonial practices, to select just several areas, within the processual definition of community resources. This ensures accuracy and particularity in application and certainty in principle, without compromising the diversity of interests, and without introducing unwelcome pre-emptive frameworks of property. The community resources which may be appropriated as information, therefore, will be referred to more generally as "traditional knowledge" to indicate the summarisation of resources that may occur in

this process, rather than attempting to presume to categorise the knowledge of communities.

2. Traditional Knowledge

While tradition comes from knowledge, and from the recognition of what has gone before, as well as what is transmitted and continued through the Indigenous or traditional group, it does not persist as a self-conscious innovation upon, or derivation from, what has gone before. In other words, the development of knowledge (and cultural understanding) is not a simple linear progression, but comes from, and refers to, tradition. This understanding of knowledge is quite distinct from commodifiable information, which is resolved within a linear model of innovation. The cohesion and cultural integrity of a particular group may be celebrated in the particular instance of cultural production, rather than the innovation of the individual; tradition rehearses what has gone before, rather than denies it. Therefore, the phrase "traditional knowledge" can be used to emphasise this mutual or cyclical relationship between individual definition, or differentiation, and community integrity. This is in contrast to the strictly linear progress that attends western legal notions of originality and individual competitive rights (or indeed the exclusive rights created by intellectual property laws).

For these reasons, the term traditional knowledge is more effectively utilised as an understanding of process, rather than a defined subject matter:

> TK arises as an issue in relating to food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, human rights, cultural policies, and trade and economic development. The working concepts of TK in each forum tend to be shaped by the policy framework of that forum, leading to a decentralized and disintegrated set of approaches, in which the issues are subjected to differing policy considerations, cultural and ethical environments, analytical tools and legal concepts. Different terms can

> therefore be used for overlapping subject matter and the same term may be used in contrasting ways.[95]

Definitional certainty where necessary, as discussed, must be derived on a case by case (or community) basis; indeed, "traditionally." This is preferable to constraining "traditional knowledge" in an unhelpful universalisation of the knowledge of Indigenous and traditional groups, and a problematic homogenisation of communities.

Nevertheless, despite efforts to understand "tradition" otherwise than in a classical anthropological context,[96] as it were, the term "traditional knowledge" does not realise adequately the movement of traditional and Indigenous knowledge into the context of "technology" and industrial property other than as "ancient" knowledge upon which industrialisation and innovation may continue. The term "traditional knowledge" also maintains a fixation upon the object of protection, rather than achieving a relevant characterisation of the relationship between individual community members and resources. In other words, it remains an objectification of the products or works of communities, and thus reconcilable within an intellectual property paradigm, rather than an effective and workable conceptualisation of community management, governance, and capacity-building through resources.

Therefore, while the term "traditional knowledge" (understood as referring to the totality of Indigenous and traditional cultural production) is preferred to the alternative of sub-divisions, the model in this work will be developed upon the concept of community resources. Within this model, traditional knowledge remains one aspect of the system of protection. Indeed, as will become clear, "tradition" and the narration of community identity inform the legitimacy of claims for protection.

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[95] WIPO/GRTKF/IC/3/9 (20 May 2002): 6.

[96] The recognition of tradition as other than static and historical is explicit in the documents of the WIPO IGC. See in particular WIPO/GRTKF/IC/4/3 (20 October 2002): 8..

Thus, community resources will be used to communicate the principles explained here with respect to "traditional knowledge," but will address a broader subject matter of which the "traditional knowledge" of community is a significant element. When dealing with present schemes for protection in later chapters, particularly intellectual property models, adherence to the terminology will be observed, indicating the more limited scope of protection described by these models and signalling the circumscription of knowledge.

The requirement for protection is that of community rather than the historical and anthropological separation of the cultural artifact. As described, the system of community resources necessarily draws upon all kinds of cultural and community expression, knowledge, and practice, without presuming to define what might be included in those "resources." Thus, conditions of innovation, knowledge, and expression cannot be imposed by external forces, but fundamentally arise in and of the community in its relationship to those resources. There can be no prior conditions for resources without this relationship to community. Furthermore, there can be no presumption of the quality of knowledge, according to these categories, without imposing upon the community a re-conceptualisation and translation of its culture and custom through those resources and their presumed use-value. In other words, in achieving community resources protection, the objects of traditional knowledge cannot be regulated externally, or separately, without an impact upon the community, and to separate knowledge from community in this way is problematic.

Why not "Traditional Resources?"

While the term "resources" is dealt with in more detail below, it is useful to note here why "traditional resources" is not adopted for the purposes of the model developed in this work. Following the foundational term "traditional resource rights," developed by

Posey and Dutfield,[97] resources are integral to the community, and as such there is an inextricable and mutual relationship between the cultural integrity of an Indigenous or traditional group ("community," as discussed below) and the resources of that group. Resources are therefore the communal means of the Indigenous or traditional group, as it were, rather than the proprietary ends in themselves, to be appropriated by the individual.

The term, "resources," is therefore perhaps more appropriately coupled not with intellect, and therefore the individual, but with tradition and the performative and constitutive relationship of the community to its resources. In this way, the value of those resources is conferred by the symbiotic process of transmission by tradition, of belonging, and of value derived from and constitutive of the community, and not to the individual personality of intellect or of innovation that travels demonstrably beyond that which has passed before. Furthermore, it is this community experience, expression, and performance that is constitutive of the individual, rather than a participation or association of individuals within a community.

Therefore, while "traditional resources" approaches the schematic framework of the present model, used alone it risks being interpreted as a summarisation of interests, largely due to the appropriation of this term within intellectual property models. The term "traditional" has been coupled both with the term "knowledge" and "resources"

[97] Posey & Dutfield (1996). See also the web-site of the Programme for Traditional Resource Rights of the Oxford Centre for the Environment, Ethics, and Society, which defines TRR as follows:

> The term Traditional Resource Rights (TRR) has emerged to define the many "bundles of rights" that can be used for protection, compensation, and conservation. The change in terminology from Intellectual Property Rights (IPR) to Traditional Resource Rights reflects an attempt to build on the concept of IPR protection and compensation, while recognising that traditional resources - both tangible and intangible - are also covered under a significant number of international agreements that can be used to form the basis for a sui generis system." http://users.ox.ac.uk/~wgtrr/trr.htm.

The term community resources is favoured to move away from intellectual property models, arguing that community is prior to the creation of property and that obligations to community resources persist despite subsequent creation of private rights.

throughout debates over intellectual property protection in this area, and the continued use of these concepts alone may maintain a problematic resonance with those models of protection.[98]

Therefore, while the term "traditional resources" may be put forward as resisting the fixation that is associated with the concept of knowledge (appropriated as information), at the same time it must be understood as an aspect of the subject matter of protection and not the totality of the relationship. Resources are dynamic means, cultural and biological assets; they are the wherewithal for any particular community to sustain, cohere, and evolve. However, the term "traditional" qualifies "resources" and maintains the emphasis upon knowledge and its quality as product. In other words, the term refers to resources produced in a traditional way, but does not give sufficient importance to the relationship between traditional and Indigenous communities, their resources, and the production, generation, and circulation of knowledge.

A further concern with the term "traditional" is that it ushers in nostalgic notions of a particular historical and geographical situation, rather than allowing for dynamic models of Indigenous and traditional groups.[99] The term "traditional" carries with it resonances of the ancient, the classical socio-anthropological sense of community as cultural artifact, and may inadvertently deny contemporary uses, practices, or knowledge of resources that are nevertheless traditional according to the group.[100] On

[98] The most obvious example of this, of course, is the categorisation in the title of the WIPO IGC – the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Indeed, the title of the present work also deploys the use of "traditional knowledge" in order to trigger recognition of the issues that have been so readily defined in this way thus far.

[99] This is despite the way the term is intended in this work, as considered above.

[100] As indicated earlier, the problematic relationship between contemporary community development and history/time in the recognition of community is examined in Chapter 1 and re-considered throughout towards the model proposed in Chapter 9.

the other hand, it remains important to ensure that ancient as well as modern forms of knowledge are eligible for protection, something which is critically difficult if not impossible under conventional intellectual property law.[101] As will become important in this work, tradition is the stability and legitimacy of community resources, to which communities express responsibilities, narrate self, and define identity. On the other hand, as discussed earlier, "traditional" describes an evolutionary process by which the stability of tradition is narrated and knowledge is developed according to the custom and values of a community, and through which the expression of that story may nevertheless diversify in communicating its immutable responsibility to that tradition.[102]

Community

It is necessary to introduce a working concept for community[103] that can somehow generalise the interests at stake (for the purposes of legal models), but without suggesting that the concept stands in for any one particular community. In other words, the working model will depend upon a process by which community is asserted, rather than a prescriptive definition with which real communities must co-incide.

A further problem is raised by the vastly problematic use of the term "community" throughout social, political, and popular discourse.[104] A community model will not be effective if it persists as a nostalgic safeguarding or "protection" of the "traditional" community, the dream of better days. In this way, "community" stands for something physical but is denied effective legal and social autonomy in its own right. If used in

[101] This incompatibility will be examined in detail in Chapter 2.

[102] See further the discussion of "tradition" in Chapter 1.

[103] This introduction to the concept of community will be developed comprehensively in Chapter 1.

[104] Amit (2002b); Amit & Rapport (2002): 42-46; Little (2002): 1.

this sense with respect to Indigenous and traditional groups, the term "community" would merely suggest a geographically, culturally, and historically fixed "collective." Furthermore, this use would facilitate the limiting legal definitions of community, where geo-historical fixations may be relied upon to extinguish access to development in the present.[105] As will be established in detail in Chapter 1, "community" is not synonymous with "collective," the latter being a kind of constructed and imagined consensus,[106] as distinct from the highly differentiated systems of governance internal to a traditional or Indigenous community. A collective suggests a geo-historical definition, which could never realise the potential of community custodianship nor recognise the community in a contemporary context of ongoing cultural and intellectual expression, experience, and interconnectedness.

In order to achieve an effective legal subjectivity for the Indigenous or traditional community, the community must be able to evolve beyond the fixation of the moment of colonisation, fixed in history and in place. This perspective enables the enduring identity and autonomy of a particular traditional community despite its evolution and adaptation in the face of ongoing colonisation and the effects of dispersal and alienation: "community should not be thought of solely as the domain of the small scale and geographically local."[107] In the present work, community will be understood to have authority and capacity with respect to resources, within a contemporary legal framework. Thus, the emphasis is shifted from that of localised and exclusory individual property of the creator or alternatively the owner, to that of community

[105] This will be expanded in Chapter 1 and in Chapter 7 in the discussion on colonisation, land rights, and the fixing of nostalgic notions of community and the cultural relationship to the land.

[106] See, for instance, the discussion in Bauman (1999): particularly pages 36-38. This distinction between the collective and community becomes important in explaining the very different concerns of traditional communities and other "communities" in the common use of the term.

[107] Little (2002): 63.

relationships beyond conventional notions of place and property. Community, understood in this way, accommodates the continuing evolution and contemporary identity of a particular Indigenous or traditional group,[108] nevertheless in accordance with its responsibilities to the ancient stability of tradition. The autonomy of community, and the responsibility of that community to tradition, is therefore located in the interactions between members and resources in narrating self, rather than deferred by the physical property posited as necessary for its realisation within possessory models of autonomy. That is, the site of legitimacy and authority is located in "tradition" and "culture."[109]

What is asserted in contemporary community, including "other" communities,[110] is communication, which may not necessarily be constrained by territorial identities.[111] Importantly, this marks a significant cognitive transformation in the concept of "community,"[112] which is relevant to current international legal and policy discussions concerning community resources. Traditional and Indigenous communities must nevertheless be understood as distinct from other "communities," which are drawn together as a "collective" in response to a feature in common. In contrast, traditional communities inhere in the prior stability of ancestral tradition, and the responsibility to narrate tradition and therefore the "self"-expression of community according to shared "values." This tradition may not be personalised or "owned" as such, but must be expressed and maintained. This expression is therefore traditional, and will continue to be traditional where there is innovation in that

[108] Golvan C (1992b): 5.

[109] Bauman & May (2001): 111.

[110] The term community may be used, for example, with respect to "online communities," "virtual communities," "artistic community," and so on.

[111] Bauman & May (2001): 111-12.

[112] See the discussion in Amit (2002b).

expression because it continues with respect for custom and in performance of the responsibility to tradition and to community autonomy.[113] It is this responsibility to tradition that founds the legitimacy of community resources, and to deny Indigenous and traditional groups genuine access to this global relevance is to compromise the effective exercise by the community of its customary law with respect to resources, and to undermine completely the nature of community as a legal actor.

Resources

The term "resources" is used in a way that is similar to its deployment in environmental studies,[114] but is by no means limited to this sense which, in particular, proceeds from the perspective of use-value to society at large. Importantly, and following its application in environmental studies, the term does introduce the idea of exhaustibility or non-renewability.[115] This will become particularly important when addressing the justification for restricting access to community resources founded in tradition, dignity, and integrity, particularly on the basis of exhaustion through inappropriate use due to translation of meaning and transformation of the "value" in the knowledge to the group. Therefore, rendered as "information," knowledge becomes paradoxically finite and exhaustible, not merely through the scarcity imposed by intellectual property rules, but through the intrusion upon its meaning and

[113] The relationship between tradition, history, and evolution of community is considered in more detail in Chapter 1.

[114] See for example the use of the term in Cutter et al (1991) and Rees (1990).

[115] See the challenges to the notion of resources as unproblematically renewable in Callicott (1997): 21; and Mathew (1994). This ethical, subjective approach to resources is also part of the concept of "ecosophy": Naess (1990). The classification of resources as renewable and non-renewable is problematised in environmental philosophy and in ecocentric approaches in particular. For instance, see Myers & Simon (1994). See also writings in "deep ecology": Devall & Sessions (1985). The concerns over "renewability" reflect the approach towards nature as inherently valuable, "and not a mere resource upon which we project out interests": Vogel (1996): 167.

integrity. In this way, the means by which communities access self-expression will be compromised.[116]

The term resources also suggests a responsibility and attending stewardship in environmental philosophy, towards an ethic of environmental or ecological citizenship in relation to those resources,[117] as well as a mutually constitutive relationship between the individual/community and the environment.[118] For the purposes of the current model, resources are understood to operate as the collective means and responsibility of a particular community or group and will be shown in this work to offer a more dynamic and adaptable viability than fixed and identified property interests; that is, the term avoids the kind of fixation that occurs with terms such as "products" or "goods".

Furthermore, resources may be understood as materialised prior to any authorial or regulatory intervention that is implied in a "product." This is critical not only to the appropriate understanding, as will be shown, of the relationship between individual, community, and production of objects of knowledge, but also to the achievement of protection of cultural knowledge that inheres in the land. It is the latter which leads to particular controversies, in that such resources may embody significant and immediate commercial value (such as mineral resources, fishing rights, and so on).

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[116] This distinction between knowledge (understanding) and information (exchange) is developed in Chapter 2 and traced throughout. Chapter 2 examines the fundamental principles of and justifications for intellectual property law. The conflicts between the economic models of "information" and cultural models of "knowledge" are characterised in Chapter 3 and again in Chapter 5 with respect to "freedom." Importantly, "resources" can indicate "knowledge" in the specific way it is used in this text, as distinct from "information" as the way in which traditional knowledge is transformed (and the way in which the term is used) by intellectual property systems and other international instruments.

[117] See the collection from the conference, "Connecting Environmental Ethics, Ecological Integrity, and Health in the New Millennium," collected in Miller & Westra (2002). See also Dobson (1995); Matthews (1994). See also the consideration of ecological humanism in Hayward (1995): 53-86.

[118] See for instance the ecological philosophy of Felix Guattari, where he develops throughout the principle of collective subjectivity: Guattari F (2000); Guattari F (1995a); Guattari F (1995b). See also his work with Gilles Deleuze, particularly Deleuze & Guattari (1994). See also the discussion of similar philosophies of connectedness and wholeness in ecofeminism in Mies & Shiva (1993).

Resources therefore indicate a kind of "wealth" and citizenry or legitimacy on the part of the group. This principle is perhaps most adequately explained in Jo Vellacott's concept of "resourcelessness" and the violent disenfranchisement of communities that accompanies the loss of resources.[119] Resources are recognised as integral to the development of populations and the governance and maintenance of community and land.[120]

Thus, while the term resources may suggest potentially problematic associations with the land and with the environment,[121] it declares at the same time a much broader responsibility to and by the community. Importantly, various categories of "knowledge," as it were, divided according to western conceptions of ownership, taxonomy, and regulation, will instead be grouped together as resources and managed according to the principles set out in community resources. This work seeks to refine the international framework for facilitation of community management, the incorporation of customary law, the embodiment of knowledge, and the recognition of cultural diversity. It does not strive to translate resources according to western conceptions of use, value, and property.

Clearly it is difficult and often problematic to define what might be included in community resources. The concept of community resources embraces the notion of inclusion, such that the actual objects or materials to be protected will be according to the community and its integral relationship to knowledge resources, rather than according to a process of externally defining and regulating as information those

[119] Vellacott (1982): 32. See also the discussion of the concept in Warren (1994): 179.

[120] In the project, *Indigenous Peoples and Governance Structures*, Garth Nettheim, Gary Meyers, and Donna Craig recognise the relationship between culturally appropriate and relevant Indigenous governance structures and the management of resources, as significant to conventional development policy through presenting culture as bound within tangible intellectual and environmental means: Nettheim et al (2002).

[121] The relevance of these concerns is explained more carefully in Chapters 6 and 7.

knowledge resources deemed to be "traditional". In other words, then, the term resources acknowledges the mutual and non-linear relationship of the "authorisation" of the community through its cultural reserves, as in the origin of the meaning and value found in those resources, and in turn the community's "authoring" or origination[122] of those reserves, that is, the ongoing circulation, use, and knowledge of those resources according to customary law and practice.

Community resources

To reiterate the earlier discussion, the term traditional knowledge may be favoured because of its international currency, but carries with it certain concerns raised by presumptions that accompany this term. On the other hand, traditional resources extends the meaning of the subject matter of protection beyond the idea of "information" and goes some way towards incorporating a broader understanding of protection for the resources of cultural, social, and political integrity and identity, both in the conventional sense and in the sense of the community itself. Furthermore, the term resources is meaningful when considering the broader concerns of protection that are at play here, including biological diversity, and the rights of Indigenous peoples and traditional groups. But as suggested through the discussion of community and of resources, the fundamental "object" of protection is not "traditional knowledge" as economic value, as such, but the symbiotic relationship between community and its resources; that is, it is community resources in the most critical sense.

Understood as the means and responsibility of community, as described earlier, the use of the term resources suggests some sort of custodianship on the part of the

[122] The concept of origination that is proposed in this work, together with the concept of in-imitativeness, to conceptualise the processes by which intellectual property broadly identifies "legitimate" knowledge and culture, will be developed in Chapter 2.

community and in favour of the community in question. This may off-set assumptions of the knowledge in question as separate from community, as public and open to appropriation and exploitation, or assumptions that the priority for protection is the "property" in the resources themselves. This custodianship may be understood not only in terms of responsibility under customary law, but also as an entitlement to those resources and their management.

This approach would begin with the recognition of those resources within the responsibility and custodianship of a particular community (the means by which to express responsibility to tradition), prior to whether they fulfil the subject matter of property for protection under intellectual property laws. The object of protection is the integrity of the community; that is, the capacity of the community to maintain and practise its custom, culture, and knowledges. In conceiving of the model in this way, commercialisation of traditional knowledge is nevertheless available to the community and to outsiders with appropriate consent from that community. Thus, a model of community resources will lead to the protection of resources (and of traditional knowledge) through the fact of their inextricable link to community.

Keeping in mind the possible problems with the term resources, the concept of community resources is proposed for the reasons set out above. The use of community resources moves away from the historical shadows of the term "traditional" and organises the interests in question within a meaning of living cultures, dynamic cultural custom, and community expression. The emphasis is less upon resources as assets or products to be exploited, and more upon resources as the capacity of community to access ongoing development and to maintain integrity. The concept of community resources suggests the fundamental capacity of the community to cohere,

rather than identifying and registering knowledge as objects of information, properties to be alienated and traded.

However, it is arguable that the concerns remain regarding the archiving and ossification of this knowledge as artifacts, and indeed that the emphasis on intellectual property persists in that it is merely synonymous with "traditional knowledge" without problematising the fundamental assumptions of this approach. The charge of synonymity must be resisted. The authority of community is not fixed within a particular geo-historical moment of colonial or proprietary history, but is an organic process of the living group. This will be recognised as critical to the ongoing relevance of community as the legal identity in any proposed model. In addition, the interests at stake are not perfectly reconcilable with an intellectual property model; rather, they include, but are not limited to, expressions and performance, practices and beliefs, resources and medicine, food and agriculture, biological diversity, and the cultural and human rights of Indigenous and traditional peoples. Constraining the debate within the language and forum of intellectual property may compromise any resultant proposal, and as discussed, both the terms traditional knowledge and community resources may carry with them a risk in this respect. Nevertheless, the concept of community resources is explicit in its departure from intellectual property discussions. While the term community may be subject to criticism as ahistorical, the importance of shifting the debate from one of property in resources to that of community integrity through its resources is momentous.

What is necessary, therefore, is a community-based system of protection and resource management according to the customary law of communities, the "shared values" by which the expression of tradition and narration of community integrity will be "traditional" (the fundamental legitimacy of the concept). Customary law may be

understood as the cohering organisation of community integrity, identity, and recognition, making the efficacy of the customary law of communities within an international framework for community resources of critical significance. As described, the system of community resources does not operate upon a "definition" of community or the constitution of the group, but is according to the values and principles of the relations as asserted from within the community itself,[123] that is, according to customary laws. In effect, it is this "personality" of the community, which is contained in the customary relations between individuals rather than the historical identity of the group,[124] which must be given legal effect as a subject within an international framework for protection.

This work characterises the application of the concept of community such that the process facilitates legal certainty without suggesting a model community. The schematic model ultimately proposed will generalise only as to the process of assertion and recognition of general principles (for the purposes of the model's application for protection), requiring modification of any suggested template to the circumstances of each particular case. This model therefore, accounts for the protection of traditional knowledge not from the economic starting-point of information, but from the cultural priority of community.

It is to "community" that this discussion now turns.

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[123] Adrian Little (2002) explains: "Thus the development of the theory of community places central importance on the actual principles that embody communitarian relationships and must be careful to avoid the prescription of the specific communities in which these bonds exist. If this can be achieved, then there is no need to engage in the often exclusionary and ethnocentric practice of selecting which communities are particularly worthy of the name" (65).

[124] The exact nature of the impact of history upon a group, and the requisite element of history in conceptualising "community" will be examined in detail in Chapter 1. While history may not be the defining feature (risking historicising and anthropologising groups) it is nevertheless relevant to the knowledge of tradition.

Chapter 1: Community, Resources, Resilience

> What is being usurped here? The very expression of potential. Belonging ... It is the inescapable observation that belonging per se has emerged as a problem of global proportions. Perhaps *the* planetary problem. Neither celebration nor lament: a challenge to rethink and reexperience the individual and the collective.
>
> Which goes last?[1]

Introduction

The "freedom" to practise tradition and to develop within community in ways that are compatible with the values of that particular community, are factors that are instrumental to the preservation of culture and community. A recent Report conducted by United Nations Children's Fund[2] maintains the inextricable nature of the link between survival of Indigenous children, self-recognition and cultural integrity, and rights to land and resources.[3] The Report asserts that the survival of culture, through knowledge and resources, is integral to the survival of communities and the well-being, confidence, and welfare of young members. The integrity of culture is intrinsic to the self-recognition and indentity of individuals, and the survival of cultural diversity is to the benefit of all members of the international "community":

> Families, elders and community leaders have an important role to play in helping indigenous children to understand that they have special resources

[1] Massumi (2002): 88.

[2] UNICEF (2003).

[3] Augé also identifies this phenomenon of "recognition" in space as indicative of the Indigenous identity: This relationship between community self-recognition and space is explored in more detail in Chapters 7. Augé (1995): 44.

> upon which to draw – spirituality, cultural identity and values; a strong bond with the land; collective memory; kinship and community. Indigenous children carry with them a reserve of knowledge that is their special inheritance, and from which we can all benefit. These fundamental values are increasingly coming to be acknowledged by both national governments and international organizations. Today, indigenous peoples are reaffirming their pride in their indigenous identity and are, in turn, nurturing this pride in their children.[4]

Furthermore, rather than identifying the management and protection of culture as an obstacle to international trade, the United Nations Development Programme (UNDP) Human Development Report 2004, *Cultural Liberty in Today's Diverse World*, identifies explicitly the need for promotion and protection of cultural diversity and pluralism in order to achieve the effective flow of cultural goods.[5]

Therefore, the need for *sui generis* systems of protection for the culture, knowledge, and resources of Indigenous and traditional peoples is drawn from the recognition of this relationship between community and its resources, and the need to recognise the authority of community and customary law, for the fundamental welfare and autonomy of Indigenous and traditional peoples. As will be examined in this chapter and developed throughout the work, a community-based system of management, custom, and protection of resources is optimal in order to identify and facilitate agency in distinctive communities. In respect of the *sui generis* qualities imagined in this system, that agency or authority is necessarily that of the community, and cannot be divested to

[4] See the editorial, introducing the UNICEF Report, by Marta Santos Pais, Director of the UNICEF Innocenti Research Centre: Pais (2003): 1.

[5] UNDP (2004): 11-12; 96-99.

individual members.[6] This optimal system is further justified by the unique value of diversity in culture, environment, and in knowledge generation itself:

> The nature of these collective rights corresponds closely to the indigenous world-view in that they reflect and promote the indivisibility of the community. This perspective is a particular strength and a special resource of indigenous peoples, and one that is increasingly acknowledged. The draft declaration elaborates collective rights to a degree unprecedented in international human rights law.[7]

Thus, at the community level, and in a global context, the capacity of communities for traditional forms of incremental and communal innovation and development promises an "international" benefit to society of biodiversity as well as heterogeneity of knowledge development and cultural practice. Indigenous and traditional peoples and their entitlement to the management, production, and dissemination of their knowledge according to the culturally specific norms of their communities merit recognition:

> In a technologically advancing world where information is a global currency, such rights are crucial to the survival of Indigenous peoples. Indigenous people have the right to control their cultures in the interests of the continued preservation of their shared identity. Further, Indigenous people have the right to own and receive economic benefits from the fruits of their knowledge and cultural labour.[8]

In the following chapters, the potential for protection within currently existing frameworks will be examined. These include primarily intellectual property law, biodiversity, rights to land, and international human rights. This present chapter will establish the concept of community to be pursued throughout this work, with later discussion arguing that conventional intellectual property regimes do not accommodate ongoing cultural preservation in a model where private property rights and monopolies serve as the fundamental framework. Furthermore, other platforms

[6] UNICEF (2003): 6.

[7] UNICEF (2003): 6.

[8] Janke (2001): 14.

for protection, such as rights to land, human rights, and environmental protection, will be shown to be approximations at best, rather than conceptualisations borne out of the concepts and objectives of community resources in and of themselves. Rather than attempting to approach viable protection and acknowledgment asymptotically, as it were, it is important to examine the potential for protection whereby customary laws of communities are given real public, political, and economic effect (not just merely reserved and partitioned effect) as necessary means by which to preserve intellectual interests through cultural and biological diversity, and through immutable international (customary) obligations.

Therefore, in anticipation of, and preparation for, the limitations of conventional intellectual property systems and other pre-existing forms of protection that will be considered in later chapters, this chapter establishes the need to strive towards what will be shown to be an optimal *sui generis* system, based on the concept of community resources. This chapter will examine critically the potential for authority to vest in the Indigenous or traditional "community." In doing so, there must be kept in mind the diverse range of communities, and the imperative against generalising communities in order to achieve legal clarity for this concept. Indeed, looking for the certainty of the concept within the particular community itself maintains an awkward preoccupation with classifying groups rather than facilitating development, and undermines the dynamic and organic process that is to be approximated through a version of community resources. In other words, while a certain level of abstraction is necessary in order to establish community resources as a legal principle upon which international obligations can be motivated, this abstraction proceeds not from the definition of "community" but

from the commonalities shared between communities towards achieving relevant and appropriate rights of self-governance and traditional development:

> Ethnology is not innocent. It represents one of the forms of colonization. The interest that ethnology brings to popular culture assumes a relationship of forces between the bourgeoisie to which these ethnologists belong and the mass or the milieu that becomes the object of their gaze …In a more general sense, every position of knowledge that establishes as an object a category of people implies, by definition, a relationship of force and domination.[9]

Rather than presuming externally to define and identify particular communities as objects of protection and cultural information, the model proposed is one of facilitation of the customary laws of Indigenous and traditional communities, by which those communities assert self-recognition, dignity, and integrity. This is a justification for a generalised approach, but not a determination of "community" as such. Community in any one instance will be established on a "case by case" basis.[10] In other words, in preparing this model it is important not to "imitate" community, as it were. To presuppose knowledge of the particular "community" or even appropriate criteria would be fundamentally unjust. The community, as such, is unpresentable by the law,[11] which cannot presume to name community.

Therefore, the preparation of the system at the end of this work will present possible but not exclusive criteria by which communities may claim protection based on relations particular to each case. It is important not to use this model of international protection for community resources to define and regulate externally the particularities of an individual community; but rather, its application is to understand and realise the relationship between communities, nation-states, and

[9] De Certeau (1997): 77.

[10] Lyotard & Thébaud (1985): 27.

[11] The concept of unpresentability is set out in Jean-François Lyotard's essay, "Representation, Presentation, Unpresentable." Using the example of modern photography, Lyotard describes how grand narratives attempt to describe perfectly their subject matter, but in doing so necessarily leave out details in order to appear like perfect presentations of the real: Lyotard (1991): 119-128.

international obligations. In this way, the model will be concerned with the obligations towards Indigenous and traditional groups rather than the mechanics within a group in the management of its resources according to particular customary laws and tradition. Indeed, it would be entirely inappropriate and inconceivable for international law to monitor, define, and regulate the internal self-governance of a traditional or Indigenous community. This move towards legal and customary recognition of the concept of "community" (otherwise outside the model for full international legal capacity), represents an important mechanism for the protection of traditional knowledge and indeed of communities in and through their resources.

Features of "Community"

To achieve authority and capacity as a legal actor, the community will necessarily have access to economic and legal systems through the international recognition of *sui generis* rights in community resources, rather than be generalised and moralised beyond a dialogue with the state.[12] If communities are forced to contract with various state departments, the imbalance in bargaining power will effectively constrain communities by market economies and national government agenda.[13] Thus, the protection of traditional knowledge through the recognition of *sui generis* rights is necessarily an issue for the global juridical order. In this way diverse Indigenous and traditional communities would be able to express themselves in relation to their cultural resources and products. Rights to resources may be most effectively realised in the context of international obligations to community identity and cultural

[12] Moral authoritarian communitarianism is often associated with the principle of the state as an enemy of community: Hughes (1996): 17. See also the more extensive consideration of the relationship between the state and community in Little (2002): particularly pp 177-199.

[13] For concerns regarding the principle of national sovereignty in models of access and benefit-sharing, in the context of biodiversity, see Chapter 6.

diversity. That is, the right to manage and use community resources in a particular way is something defined and enlivened by the customary law of a community as the fundamental and integral expression of that identity and diversity. The obligation to cultural diversity should precede and preclude all possible statute-based attenuation of mere "property" rights in cultural resources and products.

Some form of protection anchored upon the concept of community is endorsed by calls to reform systems of protection for Indigenous and traditional knowledge,[14] yet it remains a highly problematic feature of contemporary political discourse, compromised by the often insubstantial and vague application of the term in modern policy rhetoric.[15] Much of this ambiguity comes from an attempt to categorise communities and to differentiate between community qualities and actual, physical, geo-historical groups.[16] However, any attempt to categorise according to physical and/or "aspirational" qualities may be problematic and an injustice in this context. Categorisation according to physical markers in conjunction with a simplification of community origins according to "collective" values rather than acknowledging the

[14] Discussions of the special requirements of Indigenous and traditional intellectual production have included the call for separate legislation to protect Indigenous and traditional knowledge, recognising the very different value to Indigenous and traditional producers of that intellectual interest as well as the inadequacy of conventional legislative protection of intellectual property. From Australia, see the ATSIC report, *Our Culture Our Future* (1997), produced by Terri Janke. This Report recommends a *sui generis* legislative framework that draws upon customary laws and communal systems of ownership and management to include and protect all forms of Indigenous cultural and intellectual property, including ecological and agricultural knowledge (Ch 18).

[15] Little (2002): 24. For a comprehensive and insightful examination of the progression in the use of the concept of community, from the polis to the present, see Delanty (2003). For further analysis of the historical development and use of community see also Little (2002).

[16] Raymond Williams notes that the term, community, is not fixed or singular, but does indicate several key characteristics or "communities," including the commons or common people, a state or organised society, the people of a district, the qualitative idea of communal holding or ownership rather than an actual communal property, and a sense of common identity. Williams describes the first three of these characteristics as referring to actual social groups; in other words, these characteristics are those of actual physical groupings of identifiable subjects. On the other hand, he suggests that the latter two characteristics are qualitative, describing the "quality of relationship." See Williams R (1983): 75. All five characteristics, however, are indicated by the claims of Indigenous and traditional groups, and to distinguish between qualitative and actual characteristics of community is artificial in the context of those groups. It imposes a western conception of a division between the "dreaming" and physical identity.

actual complexity of internal community differentiation will undermine the quality of *sui generis* systems of community resources. Nevertheless, some key features or commonalities and concern, within the context of the international trading system, may be deciphered. These include ownership (and attending aspects of agency and quality), resources, place, tradition and history, and recognition.

1. Ownership

Communal inclusion, private exclusion

> The clan is like a cluster of trees which, when seen from afar, appear huddled together, but which would be seen to stand *individually* when closely approached.
>
> Akan proverb[17]

Conventional western discourses of identity almost invariably invoke notions of self-expression and individual control or "ownership" of that expression and the resources necessary to display it: "Late twentieth-century cultural politics makes it impossible to separate issues of identity from claims to the ownership of resources."[18] This conceptualisation reaches its logical climax in the form of privacy as a property, sometimes suggested as a mechanism for the protection of traditional and Indigenous relationships to resources. However, the value of "privacy" to understand community resources is limited, this model merely perpetuating the problematic model of "ownership" in the context of traditional resources: "a tidy separation of property and privacy is impossible within a market system that turns identity into a commodity."[19] More usually the concerns of Indigenous and traditional groups are framed as battles

[17] Quoted in Gyekye (1995): 158.

[18] Strathern (1999): 134. Note that the strenuous critique of possessive notions of "identity" in post-structuralist and postmodern feminist critical theory and identity politics. See in particular, Butler (1990); Cornell (2000).

[19] Brown (2003): 38.

of self-determination (a group self or identity, as it were) constructed upon the issue of dominion over resources.[20]

Aside from the irrelevance to traditional and Indigenous use of resources and constructions of identity, one of the major problems with this conceptualisation of identity through possession is that justifications for restrictions to access and to freedoms (of speech and self-expression),[21] become particularly difficult to sustain if the "identity" of community is also premised upon this possessory relationship to resources.[22] Broadly speaking, diverse Indigenous and traditional communalisms share a suggestion of property, if it may be understood as such, achieved through familial, kinship, and initiatory ties, and not through commercial exchange and commodification within and outside the community.[23] Furthermore, this emphasis on "ownership" displaces the identity of the community within western discourse through adherence to the individual production of subjectivity and the construction of "traditional" resources as natural, without authors, without creators, and therefore, without owners.

Until recently, the concept of appropriation was not in currency and indeed any rights of entitlement or "ownership" on the part of Indigenous and traditional people in their culture were not readily comprehended by western discourse.[24] Aboriginal art, culture, and medicine were within the realm of scientific and anthropological endeavour and their "collection" was authorised and justified in the service of

[20] For instance, see Simpson T (1997); See also IPCB (2004a).

[21] Freedom of expression is considered throughout the following chapters and in detail in Chapter 5.

[22] For a discussion of the problems with adherence to this link in the context of Australian native title rights see Povinelli (2002): 41-42.

[23] Leach (2004): 42-56; Barron (2002): 64-65. See generally the discussion of kinship throughout Povinelli (2002): 41-42. See also the critique of property models in Coombe (1998c).

[24] Gray S (1996): 30.

"science" and "international understanding."[25] This historical anthropological scrutiny has been criticised by some commentators as yet another way in which the West has consumed, commodified, categorised and civilised that which has been threatening in its "difference" and so was reconciled through its incorporation into western arts and sciences: "to represent the indigenous person as a creature of nature whose idyllic way of life has been cruelly destroyed is one way of confining the indigenous culture within a category created by the coloniser."[26] Critics argue that imposing traditional western concepts of intellectual property protection maintains the fundamental cultural distortion.[27]

The limitations and possibilities of intellectual property law will be discussed in more detail in the next chapter, but it is necessary here to consider the key assumptions of ownership and the individual or community's interaction with knowledge. Intellectual property laws, as discussed earlier, are not only implicated in the creation of the problem of the misappropriation of knowledge, but are also drawn upon as the dominant mechanism by which to achieve a solution. Indeed, traditional knowledge and the problem of its protection are repeatedly defined in the literature by reference to proprietary models and to intellectual property law.[28]

The possessive relationship between individual and information that justifies and sustains intellectual property law exists in a reciprocal legitimation with

[25] Gray S (1996): 30.

[26] Gray S (1996): 32. See also the work of Leah King-Smith, discussed in Chapter 2, where she problematises this process of constructing the traditional Indigene through representation in her cibachrome works.

[27] Barron (2002).

[28] The construction of traditional knowledge as a problem of intellectual property law is explicit in the framing of its international protection within the WIPO IGC.

the individualistic sense of self that dominates western legal paradigms.[29] This conundrum within conventional legal frameworks operates between the normative individual's possessive relationship to property and the generation (through the very exercise of that individual production and possession) of the individual legal subjectivity that is necessary to access such rights. This raises the significant obstacle of how to conceive of community "selfhood" outside such models of possession, but nevertheless ensure any one particular community's entitlement to exercise customary law in respect of its resources, and to access protective mechanisms within international legal models.

Most discussions assume that ownership in traditional communities is communal. This is sometimes appropriate, but more often it is a problematic simplification of community and customary governance and knowledge practices.[30] For instance, in relation to African community structures, Kwame Gyekye notes that the African social order is characterised by features of both communality and of individuality:

> It is of course well known that the social order of any African community is communal. But I think it would be more correct to describe the African social order as amphibious, for it manifests features of both communality and individuality. To describe that order simply as communal is to prejudge the issue regarding the place given to individuality. The African social order is, strictly speaking, neither purely communalistic nor purely individualistic. But the concept of communalism in African social thought is often misunderstood, as is the place of the individual in the communal social order.[31]

The rendering of community as "individual" absorbs the diversity in communities.[32] This process facilitates the misinterpretation of community,

[29] Underkuffler (2003): 1-2; 65-70.

[30] See the critique of "communal rights" in the context of Papua New Guinean communities in Strathern (2004): 3

[31] Gyekye (1995): 154.

[32] Guattari (1995a): 3.

and therefore of community resources, as a restriction upon the expression of the individual,[33] and therefore unjustifiable within the rhetoric of the natural justice of intellectual property rights.[34] This individualising of community is what Nancy describes as "how one loses sight of community as such, and of the political as the place of its exposition." He goes on to explain:

> Such a thinking constitutes closure because it assigns to community a *common being*, whereas community is a matter of something quite different, namely, of existence inasmuch as it is *in* common, but without letting itself be absorbed into a common substance ... The community that becomes *a single* thing (body, mind, fatherland, Leader ...) necessarily loses the *in* of being-*in*-common.[35]

In traditional and Indigenous philosophies of communalism, individual subjectivity is premised upon community and indeed the being of personhood is impossible without community and a prior collective subjectivity:

> If one is by nature a social being, and not merely an atomized entity, then the development of one's full personality and identity can best be achieved only within the framework of social relationships that are realizable within a communal social system. That is to say, the conception and development of an individual's full personality and identity cannot be separated from his or her role in the group.[36]

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[33] See for instance Bauman (2001a) discussed in more detail below.

[34] This is examined further in Chapter 2, where the dominant justifications for intellectual property are discussed.

[35] Nancy (1991b): xxxviii-xxxix. See also the discussion in Douzinas (2000): "Both universal morality and cultural identity express different aspects of human experience." (138).

[36] Gyekye (1995): 161. Compare Bauman's criticism of community as simply an antidote to instability and insecurity: Bauman (2004): 61-62. Elsewhere Bauman describes community as "missing freedom": Bauman (2001a): 4. He describes the "tribe-managed mechanisms aimed at depriving the individual of that freedom of choice and that responsibility": Bauman (1997): 33. However, this interpretation of "tribe" or community, compared to the use of the term in the present work, betrays a conflation of "collective" and "community," thus reading community as a unity, and society or tribe as interchangeable. Elsewhere, similar readings of communitarian authority are contrary to the concept of community that is sought in the present work: for instance, see the communitarian philosophies of Etzioni (1999); (2001); and (2004). See also the discussion in Abbey (1996-1997). This construction of community is refuted in the present work; however Bauman's work remains relevant for his critique of nostalgic notions of community towards developing a theory of evolutionary contemporary community for the purposes of "community resources."

In the traditional and communal production of knowledge, the "ambition" of personhood, as it were, is realised not through the competitive possession of expression, but through the communal process itself. As the Mexican community-based project, el despacho,[37] explains:

> It would be unreasonable to suggest that the authorship of individual collaborators is canceled out by the dynamics of a collective work process, that individual authorship is altogether abandoned for the benefit of the collective ... [I]f this process generates a situation in which individual authorship becomes confused and overlapping; one in which collaborators can, at some point, no longer recall in whose head a certain idea originated, then something is gained: the capacity to recognize oneself as a merely significant, simply specific, part of the mechanics of something greater.[38]

These comments by el despacho are particularly useful in illustrating that communal custodianship cannot simply be understood as an undiscriminating collective. Indeed custodianship of particular knowledge may be entirely communal or even individual. A body of traditional knowledge is not necessarily held by all members within a particular community, nor accessible by all members of a particular community, but rather is held according to the differentiation within that community. This differentiation and diversity within community can be recognised in the case of Indigenous Australian groups:

> Although individual creativity is not stressed in individual communities, it would be wrong to jump to the extreme and suppose that designs are subject to a generalised communal right. Communities are internally differentiated to quite a high degree, and their members should not be seen as interchangeable units. On any matter, some people are likely to have rights of a certain kind, others rights of another kind, and yet others no rights at all.[39]

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[37] El despacho is a Mexican, community-based art project, established in 1998 by Diego Gutiérrez.

[38] El despacho. Quoted in RAIN (2004): 23.

[39] Maddock (1998): 9. Fleur Johns cites Eric Michaels as arguing that the simple binary relationship of individual versus collective represents "some phony appeal to the primitive, or to a recently manufactured tradition": Johns (1994): 178.

Knowledge is held by one or by several in accordance with the values of the community, rather than freely and indiscriminately shared within the group (or to the benefit of humankind) in a collective and undifferentiated sense:

> The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.[40]

In other words, the relationship to knowledge is quite different from that of a "collective" ownership, describing a simplistic subject/object distinction. Knowledge is not necessarily separable and commodifiable in this way, as illustrated dramatically by the Joik or Yoik of the Sámi.[41] As the traditional chant of the Sámi, the joik is an expression of the community, but significantly, in its performance by an individual that performance in and of itself does not "belong" to the individual, but is a performance in "memory" of the "person" (individual, animal, land) to whom it is addressed.[42] It is an oration of community itself, and in performing that expression, becomes a part of the other: "a joik is not a song about a person or place but an attempt of the joiker to sing the essence of the subject."[43]

Knowledge and resources are integral to individuals and to community in Indigenous and traditional systems. Merely expressing song, dance, artistic

[40] Indigenous artist Mr Bulun Bulun quoted in Golvan (1989): 348.

[41] The Sámi are Indigenous peoples of the Fennoscandian area, incorporating Scandinavia, Finland, eastern Karelia, and Kola peninsula. See the Sámi community site at http://www.itv.se/boreale/samieng.htm.

[42] Matthias Ahren, Head of the Human Rights Unit of the Sámi Council, Finland, explains that when an individual joiks another person, that joik becomes part of that other person: "That joik is yours not mine, even though I wrote it": Ahren (2004). See also the discussion at several sites managed by Sámi people, including http://www.itv.se/boreale/samieng.htm.

[43] Sámi community site, http://www.itv.se/boreale/samieng.htm.

method, medicinal knowledge, and so on, is not necessarily perceived as control over that expression, and does not render it the property of the individual. Traditional and Indigenous entitlement over resources may or may not be communal, but the regulation of that entitlement or control is "communal," or more accurately, encompassed in the concept of community resources. That is, knowledge and resources are managed according customary law and to values shared by the community.[44] Therefore, an appropriate model will be one that vests the authority for management and regulation of traditional knowledge in the community, rather than depending upon the external regulation and registration/recognition of that knowledge according to models of intellectual property and western perceptions of "knowledge."

Conceiving of community in terms of collective ownership and property rights (within an intellectual property model) rationalises that community within a market economy, and assimilates it within a discourse of individual private rights. A collective is a group within the same geo-historical location, existing together and creating together at the same time and in the same place. To argue that collective rights are achieving recognition under international law, for instance, fails to recognise this limitation and ultimate individualisation of the "self" of that collective. For instance, the right to self-determination continues to be somewhat limited by the principle of territoriality and resists the realities of over-lapping communities that must be addressed by effective communal custodianship.[45] Indeed, it risks the same kind of historicisation and fixation of community that, as will be shown, defeats genuine access by the community to the public realm. The notion of collective rights

[44] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

[45] The principle of the right to self-determination is examined in detail in Chapter 8, together with re-considerations of its application in recent critical analyses of international human rights law.

does not necessarily begin to conceive of a community that is not reliant upon a geographical and historicised model for its identity, and so is unlikely to ensure the ongoing rights of a community to its resources, where the stable source for its integrity (in the face of dispersal and evolution through the forces of colonisation) comes from the inter-relationships and mutual recognition[46] within the group and the responsibility to tradition. This responsibility or stewardship has been identified by the IGC:

> While IPRs confer private rights of ownership, in customary discourse to "own" does not necessarily or only mean "ownership" in the Western non-Indigenous sense. It can convey a sense of stewardship or responsibility for the traditional culture, rather than the right merely to exclude others from certain uses of expressions of the traditional culture, which is more akin to the nature of many IP rights systems.[47]

This responsibility is therefore to the stability of tradition and the stewardship of the Land or Territory,[48] as distinct from a dominion exercised over the objects or products of knowledge. Discussions in later chapters concerned with biodiversity and with rights to land, will show that understanding the relationship between cultural expression and the land is critical to this development of the concept of community, and to concretising international responsibility to the protection and promotion of cultural diversity through the interaction with biological diversity. This development in the concept of community facilitates not only access to rights in Indigenous and traditional resources, but also an ecological citizenship, as it were. In other words, biological diversity is not co-incident merely with the geo-physical area, but rather with the topological development of different and overlapping social and cultural

[46] The concept of recognition is considered in detail later in this chapter. See further the relationship between recognition and the production of territory in Chapter 7. Recognition will be seen to be critical throughout the development of community resources in this work. See also Augé (1995): 44.

[47] WIPO/GRTKF/IC/4/3 (20 October 2002): 22. See also *Our Culture Our Future* (1997): 44.

[48] The concept of territory is developed in Chapter 7, but necessarily develops the notion of land beyond western concepts of real property and towards a cultural production of community space.

spaces. Thus, communities and their social and cultural development are essential to approximating a complete picture of global biodiversity because that biodiversity is a social and political knowledge. Providing effective legal and political opportunity for Indigenous and traditional communities to pursue cultural and customary laws and expression in a contemporary socio-political context is essential, therefore, not only for community integrity but also for fulfilling responsibilities and obligations to cultural and biological diversity.

Owning the realised rights to property

As distinct from the creator or author, the role of the owner has become increasingly critical in modern intellectual property law. Intellectual property must be understood as distinct from physical or exhaustible property; indeed, it is the rights themselves that become the critical "property" in a sense. Thus, intellectual property is necessarily justified and realised within a socio-political and economic context in which those rights are informed and mobilised by market forces. Intellectual property rights are virtually meaningless without the financial reserves and capacity to defend and enforce them. Intellectual property must be maintained, and as a normative principle of intellectual property law, private rights of ownership must be enforced in order to realise the intellectual property therein through the very expensive processes at one's disposal.

An important example is that of biotechnology and pharmaceutical patents. Research and development in these fields will be undertaken largely through the partnering of inventors and companies, in order to achieve the commercialisation of the ultimate product.[49] The rights of invention (that is, the rights to the patent) are effectively (that is, commercially) useless unless the commercial resources are available to enforce

[49] Dutfield (2003): particularly the discussion in Chapters 1 and 2; See also Sell (2003).

those rights. Biotechnology partnering and commercialisation agreements are evidence of the value of that intellectual property being found largely in the resources to defend it at the commercial stage. Inventors rarely retain the intellectual property, but assign their rights to the commercial interests that have funded the research and have the resources to defend and enforce those rights. Very clearly, intellectual property is an increasingly powerful display of the resources necessary to create and, perhaps more importantly, to assert those rights. Similar observations have been made in the increasing "celebrity" attached to intellectual property.[50]

This aspect of the corporatisation of intellectual property law and its institutional effects[51] is perhaps most adequately understood from the perspective of the ambition and individualism of the legal "subject," as realised through that subject's ability to access those rights (and to display that ability). This is a significant demonstration of the inappropriateness of the application of the private ownership rights of intellectual property to the communal resources of traditional knowledge, where the expression of community is perhaps more relevant and where authorship is claimed "more in a way of validating his/her belonging to the group than as a demand for personalized recognition."[52]

The increasing disjunction with respect to ownership and authority over information, as distinct from creatorship and the contribution to knowledge, is implicit in the 1982

[50] It has been suggested that this is indicated by the rise in the social and legal justification of rights in personality: Landes & Posner (2003): 37-70. See also the discussion of the relationship between intellectual property and celebrity in Black (2002); and privacy in Samuelson (2000).

[51] Dutfield examines the phenomena of regulatory capture and institutionalism with respect to intellectual property in Dutfield (2003): 25-45.

[52] Trama. Quoted in RAIN (2004): 24. Trama is a network of Argentinian artists, created in 2000, and based in Buenos Aires. Trama facilitates the access of those artists to the international political sphere through expression of community, thus sustaining and strengthening the individual's bond with community and locality. The philosophies of this programme are of particular interest to the way in which the present work seeks to demonstrate the production of community locality or territory through expression and practice of custom, knowledge, and tradition, without sentimentalising community through physical restriction to place.

Model Provisions on the Protection of Expressions of Folklore, developed by UNESCO and WIPO.[53] The provisions acknowledge and describe the possibility of communal rights, but make no reference to authors or ownership throughout the *sui generis* system presented.[54] Yet "community" remains beyond the reach of conventional intellectual property models of ownership and moral rights.[55] It is inaccurate to argue that there is no basis for "ownership" within Indigenous or traditional communities. To do so is to deny customary laws and community integrity with respect to resources, and to legitimate the exploitation of traditional knowledge as a public resource. Furthermore, this is not a true acknowledgment of resources as public, in that these actions simultaneously remove that knowledge as intellectual property to the private domain of the particular commercial interest holding the rights thus created, through the operation of patents or through works derived from traditional methods and protected by copyright, and so on. This line of "global resources" reasoning fails to understand that customary use or communal custodianship is simply a different model of possessory-like alignments with respect to the resources, from that suggested by intellectual property laws.[56]

Community is as much about concealment (that is, according to the internal differentiation of community) as it is about sharing knowledge.[57] It is wholly

[53] UNESCO-WIPO. (1982). Model Provisions for National Laws on The Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

[54] Note the discussion in the Fourth Session of the WIPO IGC in WIPO/GRTKF/IC/4/3 (20 October 2002): 21. See also *Our Culture Our Future* (1997).

[55] See the discussion in Chapter 2 regarding provisions for joint authorship and inventorship in intellectual property law.

[56] This is explored in more detail in the following chapters.

[57] The importance of "concealment" is characterised by Marilyn Strathern with respect to the ubiquitous use of the word "culture," and thus its transformation through discursive commodification: Strathern (1999):

> Think of the recent fate of 'culture', a concept that embodies an intellectual capacity to comprehend the world in certain ways. Over the last decade the concept of 'culture' has become a ubiquitous coin – it shoots through all sorts of context, able to turn virtually

inaccurate to suggest that "community" or "tradition" creates communal, shared, and public knowledge as a global resource to which there is unfettered access.[58] Thus, alternatives within conventional intellectual property protection sought through open source/open access models and the creative commons movement are nevertheless inadequate models for traditional knowledge protection in that the latter is notably about restricting access and regulating the exchange of cultural material according to customary law. Indeed, as will be considered in greater detail later,[59] an application of these models betrays several assumptions regarding the protection of traditional knowledge: that customary law is relinquished and obsolete, fossilised and inapplicable; that the motivation for the production of traditional knowledge is the benefit of all humankind; that such knowledge exists as "objects" or products for the purposes of their location within the public domain; and the abandonment of traditional knowledge as common objects.

2. Resources

What is critical in the context of customary and traditional use of resources, and what must be protected (as advocated by the presentations to the WIPO IGC[60] and reports of various Indigenous groups[61]) is not merely the object of intellectual enterprise in

> anything into exemplifications of itself. This may be to the irritation of the anthropologist who was once wont to produce 'culture' as a hidden illumination of his or her materials. Although the concept was embracing (anthropological descriptions proceeded against the background of culture), it would be foregrounded only at certain explanatory moments, as an explicit reminder of the nature of the phenomena under study. Such revelations are no longer possible. (58)

[58]. See the discussion in Odek (1994); Brush (2003); and Barron (2002). Of particular interest on this point, is the archived on-line discussion of participants in the Free Software Foundation Online Discussion Forum: http://www.mail-archive.com/fsf-friends@mm.gnu.org.in/msg00374.html

[59] The potential for strategic adaptations of intellectual property laws in the open source and free software movements, open access models, and otherwise, are considered in detail in Chapter 5.

[60] The work of the IGC will be considered in detail in Chapter 4.

[61] Indigenous Australian intellectual property lawyer, Terri Janke, has undertaken extensive reviews of the relationship between Indigenous Australian culture and intellectual property in the comprehensive report, *Our Culture Our Future* (1997) and also the WIPO Report, *Minding Culture* (2003).

and of itself, but the nature of its exchange and the ability to control and regulate that exchange. What maintains the value of the traditional object is not necessarily inherent to the object itself, the value of which may be merely secondary to the primary importance of the cohesion and integrity of the community through its relationship and interaction with its resources. The object of protection is not necessarily the resource as an end in itself but the ability of the community to continue to function and observe internal differentiation and communal integrity through its management and deployment of resources. The ability, "to protect, in a positive sense, their traditional cultural expressions, which, where collectively owned, should be protected in the name of the relevant community"[62] arose as one of the key concerns of Indigenous peoples and traditional communities consulted as part of WIPO's fact-finding and other consultative processes.[63]

Therefore, the "evolution" of the culture, beyond the physical, localised, geographical place,[64] should not preclude or supersede, as it were, the protection imagined within a *sui generis* system of obligations to the practice of community itself. This is because such a system should facilitate the particular community's legal and social capacity to regulate itself and develop through social and cultural differentiation unique to itself. In other words, a *sui generis* system of community resources resists the fixing of the "identity" of the object itself (whether, as later chapters will consider, that fixing occurs through the identifiable author in traditional art, the invention in a medicinal method, the required unbroken connection to place in Australian native title, or otherwise).

[62] WIPO/GRTKF/IC/4/3 (20 October 2002): 14.

[63] WIPO FFM (2001).

[64] This is considered further in the discussion of "place" below.

The need to consider the continuing evolution of culture, rather than fixing tradition in a location and a moment in history, is a key concern of the IGC. In its Fourth Session, the following important assertion is made in the preliminary analyses:

> [C]ultural heritage is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary – tradition thus builds the future. While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework.[65]

Thus, a workable and relevant concept of community resources must include the community's ability to evolve and develop upon its resources, rather than fixing traditional knowledge to a particular moment of authorship in that community's history or fixed to a particular identity of owner. In this way, "additions" to the culture are also eligible for protection as cultural and traditional knowledge, and not limited by notions of cultural heritage and historical artifacts. While the IGC considers that there may be a necessary distinction between "traditional" heritage and modern, evolving cultural heritage, an effective model of community may render this distinction redundant and inappropriate. This would be consistent with one of the primary objectives of Indigenous peoples and traditional communities, gathered during WIPO's fact-finding process,[66] and considered in several significant reports:[67] namely, that Indigenous peoples and traditional communities "be regarded as the primary guardians and interpreters of their cultures and arts, whether created in the past, or developed by them in the future."[68]

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[65] WIPO/GRTKF/IC/4/3 (20 October 2002): 8.

[66] WIPO. FFM (2001).

[67] *Our Culture Our Future* (1997); McDonald (1998); see also Kuruk (1999); *Minding Culture* (2003); WIPO FFM (2001). See also the documents of the WIPO Roundtable on Intellectual Property and Indigenous Peoples, Geneva, 23-24 July 1998, available at http://www.wipo.int/documents/en/meetings/1998/indip/index.htm.

[68] WIPO/GRTKF/IC/4/3 (20 October 2002): 14.

If the use of traditional knowledge and methods to render contemporary expressions occurs as a re-affirmation of the individual's communal recognition and self-identification as part of that community, it may nevertheless be traditional. As discussed in the Fourth Session of the IGC:

> The working concept of TK … puts a particular emphasis on the fact that TK is "tradition-based." That does not mean, however, that TK is old or that it necessarily lacks a technical character. TK is "traditional" because it is created in a manner that reflects the traditions of the communities. "Traditional", therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated … TK is a means of cultural identification of its holders, so that its preservation and integrity are linked to concerns about the preservation of distinct cultures *per se*.[69]

Therefore, contemporary "non-traditional" work may be part of the tradition and custom of a particular community if its use of knowledge is in fact traditional according to the shared values of the community,[70] that is, compatible with the integrity of community and its custom. A community-based system of protection and custodianship will accommodate contemporary production as traditional use of knowledge, where that use is constitutive of and contributing to the community through ongoing communal mutual exchange and recognition. Therefore, contemporary expression may nevertheless be traditional and, potentially, the community may govern the utilisation of traditional law and custom in those works. While this will not preclude the creation of individual intellectual property rights in that work, the exercise of those rights may be subject to customary law and to the individual's ongoing recognition by the community. As examined later, the immediate

[69] WIPO/GRTKF/IC/4/8 (30 September 2002): 11.

[70] See the case of Indigenous Australian artist, Leah King-Smith, in Chapter 2.

concern is whether present frameworks may be adequate to protect that contribution, or whether a *sui generis* system must be devised.[71]

The environmental resonances of community resources are critical to the relationship between tradition, place, and culture, where resources and community exist in a mutually constitutive relationship. It is through this symbiotic process that political, cultural, and legal territory is restored, despite the fracturing effects of physical dispersal and alienation from land and from tangible resources:

> The field of politics for ecological ethnicities is the community, and not necessarily the civil society or the nation-state as one would usually suppose … [T]he seeds of regeneration need the firm soil of community and culture, vernacular technology and agriculture, collectivities and memories.[72]

It is to the "firm soil of community," and the priority of the experience of community for the regeneration of "place," that the discussion now turns.

3. Place

The Geography of Community

> One cannot tame the voices of the flute, voices of such uncanny lightness yet miracle of being that they are able to *tilt* the two rivers, the visible and the invisible rivers, into diagrammatic discourse; and in so doing to create the four banks of the river of space into a ladder upon which the curved music of the flute ascends. Those banks are dislodged upwards into rungs in the ladder and into stepping stones into original space.
>
> Wilson Harris (Guyana), *The Four Banks of the River of Space*[73]

> Indigenous communities and their individual members draw their identity and form their world-view from specific historical and cultural contexts that include their own beliefs, social organization, language, customs and knowledge. As children, indigenous people develop a profound bond with

[71] The limitations of intellectual property are examined in Chapter 2, and the current international discussions administered by WIPO are reviewed in Chapter 4. Flexibilities in intellectual property law, in the context of open source and open access models, are reviewed in Chapter 5.

[72] Parajuli P (2001): 574.

[73] Harris W (1990): 44.

> their territory of origin, whether or not they and their communities still occupy this space.[74]
>
> The assumption that community can be created by geographic isolation is invalid. Real social groups cut across geographical barriers, and the principal aid to social cohesion is looseness of grouping and ease of communication rather than the rigid isolation of arbitrary sections of the total community with impossibly difficult communications.[75]

Ulrich Beck describes the tension between the attachment to habit and custom in traditional societies, and the fundamental notion of risk in a progressive, enlightened, future-oriented society,[76] a risk to which the protection offered by the grand narrative of international intellectual property laws is applied.[77] For the customary law of communities, the value of resources and their necessary protection is derived from systemic community practices and the preservation of connections not simply with place but with habit and the past (the space[78] of community). The essential problem for the organised protection of community resources is to reconcile these principles with the risk and individualisation attached to modern notions of development and trade efficiency,[79] and the attempt to counter the risk of uncertain futures in global resources.

The progress of society, and ultimately the observations of "development" levelled at traditional communities are subject to the self-conscious and reflexive nature of modernisation and development and thus, the relationship between the process of

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[74] UNICEF (2003): 2.

[75] Art project of Alison and Peter Smithson, and Nigel Henderson, "Grid Prepared for *CIAM 9* (Congrès Internationaux d'Architecture Moderne)," 1953.

[76] Although this chapter and the previous chapter necessarily introduce this notion of global risk, it is developed in greater detail in the following chapters concerning the systems put in place to manage that risk, such as intellectual property and international environmental protection.

[77] Beck (2002). This concept of the "grand narrative" was introduced earlier, and is developed in the discussions in Chapter 2, including that of intellectual property and global biodiversity.

[78] A more detailed consideration of the relationship between place and space, introduced here, is given in Chapter 7. See also De Certeau (1988).

[79] See Lyotard's discussion of the concept of development in *The Inhuman*: Lyotard (1991): particularly at 2-7.

modernisation and the institutions of that development, particularly that of the legal institution.[80] The "nostalgic" construction of Indigenous and traditional interests as vested in the continuity of connection to place and geographic community betrays a self-conscious construction of cultural resources within the context of the institution of western legal paradigms and the legitimated justice of individual property interests. The requirement for connection to place is at once already circumscribed within a discourse that "traditionalises" the Indigene and is a requirement itself defeated by the process of modernity.[81] Furthermore, within the economics of this attachment to place, the tradition of those not identifying with place is discredited.[82] This attachment to place must be problematised as a strategy of categorisation which continues to archive and historicise the traditional and Indigenous community,[83] without accounting for its capacity for evolution in a contemporary context:

> Our increasing interconnectedness – and our growing awareness of it – have not, then, made us into denizens of a single village. Our most basic social identities – the identities that are called "tribal" in Africa, for example, or the ethnic groups of the Balkans or the modern multicultural city – are no longer village identities. Everyone knows you cannot have face-to-face relations with six billion people. But you cannot have face-to-face relations with a hundred thousand or a million or ten million (with your fellow Serbs or Swahilis or Swedes) either; and we humans have had practice in identifying, in twos, cities, and nations, with groups on this grander scale.[84]

Departing from models fixing community to place, community resists determination and placement, but rather experiences "locality" through the practice and interaction of culture. Appadurai describes the construction of "locality" as distinct from political

[80] Beck U et al (1994).

[81] See further, Chapter 7 and the relationship between this connection and claims to land.

[82] In the discussion of the terms "Indigenous" and "Traditional" in the Introduction, this concern was introduced in the example of the Roma who, despite not self-identifying as Indigenous and not being recognised as Indigenous by the United Nations, are included as Indigenous according to other civil society organisations, because of the unifying principle of a commitment to cultural diversity. See the CWIS and the Indigenous Studies Virtual Library http://www.cwis.org/wwwvl/indig-vl.html

[83] The relevance of time and history is considered with respect to tradition below.

[84] Appiah (2003): 195-196.

deprivation suggested by the geographical "neighbourhood:" "Neighbourhoods, in this usage, are situated communities characterized by their actuality, whether spatial or virtual, and their potential for social reproduction."[85] Appadurai's conception of locality, is particularly useful in the present context, in that it conceives of the dynamic environment of the inter-relationships between members and their capacity as community, rather than the merely geographical locus of the neighbourhood. Neighbourhood is one indexical instance of community, but is not representative or essential for community; an example, but not exemplary:

> [Locality is] primarily relational and contextual, a phenomenological aspect of social life, categorical rather than either scalar or spatial. Neighbourhood, on the other hand, he defines as actually existing social forms in which locality is realized.[86]

The agency of community (as locality) is therefore not limited by detachment from place, where place is part of a taxonomical imperative with regard to community as form, fixed as an anthropological and cultural artifact, despite the way in which place continues to figure as an organising metaphor for the connection within communities.[87] Community, rather, is a quality or sociality, rather than a geo-historical object. Importantly for the purposes of the present discussion, Appadurai recognises the significance of locality as "a phenomenological aspect of social life," thus rejecting community as purely virtual or ideological. Furthermore, in the context of community resources, it is important to facilitate community not as "an actualized social form,"[88] but in terms of the commonalities that pertain to the relationships to

[85] Appadurai (1996b): 179.

[86] Amit (2002b): 2-3.

[87] Metaphors of place, space, and land remain intrinsic to the organisation of cyberspace and virtual communities. For instance, "site," "address," "rooms," "home," "forum," and "visit" all clearly indicate the creation of community through attachment to place and the production of locality within a virtual, non-terrestrial space. See also Castells' consideration of the geography of virtual space, in Castells (2002), and the re-invigoration of the public sphere described in Robins (1995): 135-155.

[88] Amit (2002b): 3.

resources, and the urbanising of traditional groups. As distinct from place, the space (or site of contestation) of traditional resources, is that of culture. A reduction to place alone leads to a misappropriation and objectification of traditional knowledge that is inevitably disenfranchising and displacing to Indigenous and traditional groups.[89] Access to self-governance of traditional knowledge according to customary law, therefore, is necessary for cultural autonomy and thus gives place to the disenfranchised (by the law) and displaced (from culture):

> Culture is the battlefield of a new colonialism; it is the colonized of the twentieth century. Contemporary technocracies install whole empires on it, in the same way that European nations occupied disarmed continents in the nineteenth century. Corporate trusts rationalize and turn the manufacture of signifiers into a profitable enterprise. They fill the immense, disarmed, and almost somnolent space of culture with their commodities … This economic system … [replaces] the act of democratic representation with the reception of standardized signifiers that destine workers to become consumers, and that turn people into a public mass … [C]ulture appears as the field of a multiform battle between the forces of the soft and the hard. It is the outrageous, cancerous symptom of a society divided between the technocratization of economic progress and the folklorization of civic expression[90]

In other words, conflict over cultural difference and knowledge cannot be resolved through the rationalisation of culture, the compartmentalisation and corporatisation of culture according to the violence of intellectual property fragmentation and framing of traditional knowledge. If traditional knowledge is translated into information commodities for consumption, then all cultural obligations become assimilated within a relationship of consumption, with all communities transformed into consumers. Arguably, the translation of these concerns within intellectual property frameworks decimates the relationship between community and resources that is necessarily indicative of "cultural knowledge," as distinct from commercial information to be

[89] It is important to assert that this is not to deny the importance of physical land, but to reject the simplification of Indigenous cultural origins to western conceptions of real property and competition for resources. Thus, it opens up the space of community, rather than confines it to place.

[90] De Certeau (1994): 134.

traded by virtue of intellectual property "physicalisation" of that information. Indeed, resistance to the recognition of customary law and to *sui generis* protection for traditional knowledge relies upon an artificial polarisation of information/knowledge, high culture/tradition, art/folklore, invention/imitation, legal certainty/custom, and so on. This is continued not only in the rendition of traditional knowledge as open, shared, and for the benefit of all, but also in the charges of hypocrisy laid against Indigenous and traditional groups wishing to commercialise or to license their traditional knowledge where appropriate.[91]

The model of community resources must offer a development of the concept of community that will have authority and capacity within a contemporary legal framework. In this way, the emphasis is shifted from the localised and exclusory individual property of the creator or alternatively the owner, to community relationships beyond place and property, thus accommodating the continuing evolution and contemporary identity of a particular Indigenous or traditional group.[92] As Bauman writes, "Space, to put it in a nutshell, mattered. But now it matters less."[93] The autonomy of community must be located in the interactions.[94] Thus, community is organic, rather than deferred by the physical property posited by regulatory discursive models as necessary for its realisation, as explained by Bauman and May:

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[91] See Howard P (1994) on knowledge development; Sommer et al (2004) on the treatment of traditional knowledge as "unscientific."

[92] Golvan (1992b): 5.

[93] Bauman (2001b): 37.

[94] This has some resonances with the work of psychoanalyst and philosopher Félix Guattari on social and mental ecology (using the example of institutional psychotherapy at the La Borde clinic): Guattari (1995a). Guattari suggests that in an atmosphere of shared activity, effective communication brings with it an assumption of responsibility. He suggests that the patient's subjectivity is not to be recalled, in a kind of recovery, but is produced *sui generis* in what he describes as a process of subjectivation and an opportunity for "recomposing their existential corporeality." (7). Guattari writes: "We are not confronted with a subjectivity given as in-itself, but with processes of the realisation of autonomy, or of autopoiesis" (7). See in particular Guattari (1995a): 6-7.

> The times have changed because information can now move apart from physical bodies. Given this, the speed of communications is no longer held down by the limits that are placed upon it by people and material objects. For all practical purposes, communication is now instantaneous and so distances do not matter because any corner of the globe can be reached at the same time. As far as the access and the spread of information are concerned, 'being close' and 'being remote' no longer have the importance they once commanded. Internet groups do not feel geographical distance to be an impediment to the selection of partners in a conversation.[95]

As Bauman and May go on to argue, this changes the conventional understanding of community as "a territorial or 'local' creation because it is confined in a space that possesses boundaries drawn by the human capacity to move."[96] What is asserted in contemporary analyses of community is communication,[97] which may not necessarily be constrained by territorial identities. Nevertheless, it is necessary to reject consensus as a prerequisite for that communication.[98] The individual personhood achieved through the genuine collective subjectivity of the community cannot be summarised by assimilative consensus. Importantly, this marks a significant cognitive transformation in the concept of "community" which is relevant to current international legal and policy discussions concerning traditional knowledge. To deny traditional groups complete access to this global relevance is to compromise the

[95] Bauman & May (2001): 111.

[96] Bauman & May (2001): 111-12.

[97] For instance, see the concerns of Jürgen Habermas, where community is constituted by communication: Habermas (1984); Habermas (1987). See also Delanty (2003): 167-185. In the current discussion, departing slightly from Habermas, community is a prerequisite for communication, but indeed is enlivened and sustained by that communication.

[98] Lyotard (1984) writes, "Is legitimacy to be found in consensus obtained through discussion as Jürgen Habermas thinks? Such consensus does violence to the heterogeneity of language games. And invention is always born of dissension" (xxv). See also Douzinas (2000): 138 (considering similar objections in Nancy, to construction of community on notions of consensus). The following chapter considers Lyotard's theory of the grand narrative, and suggests that this is a useful way to understand the dominance and legitimacy of intellectual property law and the "suspicion" of customary law. Necessary to effective local autonomy for communities, is this "heterogeneity" and the emergence of the "minor" laws (first considered in the Introduction and explored further in Chapter 2). This troubling of the notion of consensus has useful resonances with the consideration of freedom, and of freedom of expression in particular. See Chapter 5, where the notion of "freedom" is problematised as an artificial "consensus" that must presume that everyone is free in order to apply without question.

effective exercise of community autonomy and customary law with respect to traditional knowledge and to undermine completely the nature of community as a legal actor.

While the model of community set forth in this work is based upon social and political organisation, according to customary law, clearly this organisation is not necessarily bound by locality or by history, but is experienced through the interactions of its members (and in particular, the principle of recognition considered below). The "community" is bound by shared customary laws and values according to which the integrity of that community may be perceived and recognised beyond physical, intimate space. Thus, community creates a sense of place and shared identity through the practice, expression, and mutual recognition of culture. Culture, in this way, is understood both in terms of local identity and as constitutive of that locale.

> Indeed, culture and identity were treated as inseparable because people think of culture in terms of their local identities … Community was not simply locale … it had become the nexus of an inextricable convergence between culture, place, intricate social relations and collective identity. Community was thus converted into a form of "peoplehood" that was now very deliberately and self-consciously inserted into complex societies. This was not an isolated and self-contained form of peoplehood, but a fundamentally relational one.[99]

Benedict Anderson's explanation of the departure from immediate interaction between intimate individuals to the modern community of communication (print, media, cyberspace) in his notion of the "imagined community,"[100] is immediately relevant to the present discussion. However, the model of community put forth in the present work invigorates the socio-political and cultural realities of actual Indigenous

[99] Amit (2002b): 5. Here Amit is referring to Benedict Anderson's "imagined community" (Anderson B (1983)).

[100] Anderson B (1983). See in particular Anderson's introductory definition of the concept: 5-7.

and traditional groups. Thus, unlike criticisms of the imagined community,[101] this model does not compromise the socio-political dimension of the groups involved, but in fact coheres because of their participation in the public sphere with responsibility to the stability of ancient tradition. In considering the anthropological movement of the study of community from one of social organisation to one of cultural identity, Vered Amit is concerned with the loss of key elements in what is described as an "attenuation" of community:

> Community had thereby become much more than locality, for now it could be extended to virtually any form of collective cultural consciousness. By the same token it had also become much less, since it was no longer necessarily an effect of the social relations and institutions.[102]

For the concept of "community resources," however, the legal, political, and cultural nexus between community and its (traditional) knowledge provides the necessary re-affirmation of the social and recovers a sense of "place" through the cultural specificity of knowledge. This "place" of community is otherwise "dis-placed" by intellectual property models that attenuate community through its assimilation within the economic models of intellectual objects: "The (mis)appropriation and exploitation of ideas, knowledge, spiritual and healing practices, etc. is part of a continuous process that displaces peoples and history."[103] Community resources, therefore, actualise the necessary process of belonging that may be fractured through ongoing colonisation by western legal models and "impersonation" through the appropriation

[101] Amit (2002b): "This affective charge of nationality, the capacity of people to identify with and sometimes even be willing to fight or die on behalf of strangers crucially drew on a conception rather than actualization of solidarity. Thus, Anderson's work deliberately decoupled the idea of community from an actual base of interaction, or to use Appadurai's terms, posited a fundamental disjuncture between locality and neighborhood and pushed this process backward to a historical crossroad predating current globalization trends by several centuries" (6). Herzfeld argues: "He does not ground his account in the details of everyday life – symbolism, commensality, family and friendship – that would make it convincing for each specific case or that might call for the recognition of the cultural specificity of each nationalism," Herzfeld (1997): 6.

[102] Amit (2002b): 6.

[103] Blood (2001): 1.

and re-presentation of traditional knowledge. This is demonstrated in Article 2 of the Final Communiqué of the Istanbul Declaration,[104] which states:

> The intangible cultural heritage constitutes a set of living and constantly recreated practices, knowledge and representations enabling individuals and communities, at all levels, to express their world conception through systems of values and ethical standards. Intangible cultural heritage creates among communities a sense of belonging and continuity, and is therefore considered one of the mainstays of creativity and cultural creation. From this point of view, an all-encompassing approach to cultural heritage should prevail, taking into account the dynamic link between the tangible and intangible heritage and their close interaction.[105]

Thus, the practice of culture "creates" locality or space, as it were, in a kind of countering of the effects of globalisation. The homogenisation of culture through colonising effects, to an extent, is countered by the participation of community in the political, economic, social, and cultural public sphere. Mis-appropriation of traditional knowledge and expressions of culture is in itself a threat to that participation in that it is an effective loss of voice, a loss of the capacity "to express their world conception through systems of values and ethical standards."[106] Mis-use of those systems compromises their meaning, exhausts their value, and transforms them into meaningless commodities. Thus, mis-appropriation is an appropriation of voice, thereby denying access to the political sphere, and ultimately denying the freedom of Indigenous and traditional groups. Communities must be enabled to continue self-governance of resources according to customary law in order to participate in an

[104] The Final Communiqué of the Istanbul Declaration represents the outcome of the Third Round Table of the Ministers of Culture on "Intangible Cultural Heritage, Mirror of Cultural Diversity," staged in Turkey, 16-17 September 2002.

[105] Istanbul Declaration (2002): Paragraph 2.

[106] Istanbul Declaration (2002): Paragraph 2.

international environment, without being assimilated or simplified as "individual," uniform legal subjects within existing systems.[107]

Clearly, in the same way that the community's agency cannot be identified as arising in a particular place, it similarly cannot be situated and archived through its definition by a moment in history.

4. Tradition and History

> Tradition is never simply passed on across time ... [I]t is integral to the broader process of developing a historical understanding, which is embraced by changing temporal horizons and moves with them. That is why, when tradition acts as the bridge between memory and imagination, meaning and value, theory and practice, it is a bridge that is always being built. It can never be completed for all time because time is always moving beyond that which it seeks to bridge.[108]

The Potential Community

Related to the concerns against "locating" community or fixing it within a geographical locus, are the problems raised where the concept persists as a distant, exotic past, and where protection is understood as a safeguarding, moralising sanctuary of the "traditional" community. As Bauman explains, in the common sense of the term: "'Community' is these days the last relic of the old-time utopias of the good society; it stands for whatever has been left of the dreams of a better life shared with better neighbours all following better rules of cohabitation."[109]

In other words, "community" in this way stands for something physical and historical but is denied effective legal and social autonomy in its own right. If used in this sense with respect to traditional groups, the term "community" would merely sustain

[107] The following chapters will trace this notion of "belonging" and its attachment to place, through the translation of community and information in intellectual property law, and the importance of "territory" in biodiversity, land rights, and human rights frameworks. In doing so, the concept of "territory" will be re-thought in terms of its realisation in the relationship between community and resources, and its situation within culture rather than geo-physical place.

[108] Negus & Pickering (2004): 104.

[109] Bauman (2000): 92.

sentimental pre-conceptions and would merely represent the geo-historical fixation of a "collective." It could never realise the potential of communal custodianship nor recognise the community in a contemporary context of ongoing cultural and intellectual expression. In effect, the "personality" and experience of the community is contained in the relations between individuals, the recognition of tradition and of community through the practices, custom, and values of its members, rather than the place or historical pre-modern stability of the group. As considered below, the "recognition" by and between members, and by and between communities (including nations and the "international community") is critical to understanding the potential for community (and customary law) to act within an international framework for protection.

This expression of self-recognition is critically and intrinsically embodied in the responsibility to tradition, in the practices of culture and customary law that make community literally coherent. Thus, the legitimacy of the community inheres in its responsibility to tradition, but the expression and narration of that tradition is evolutionary – "traditionally" speaking. This relationship between tradition and community refuses to dismiss ancient and traditional knowledge as apart from the narrative of progress, recognising instead the significance of traditional development of knowledge and innovation.[110]

Conventional notions of history, as informed by the dominant mode of production,[111] seemingly legitimate the ongoing treatment of traditional knowledge as cultural

[110] See Frow (1997). Frow rejects the self-conscious modernist dislocation and demotion of ancient pre-modern knowledge in what he describes as a refusal of "the narrative of teleology that relegates real history and the time of lived experience to a time before representation and the mass-mediated spectacle" (8).

[111] See the work of Althusser & Balibar (1970) and, in particular, Althusser (1970): 91-118. In this essay Althusser draws connections between conventional notions of history and the dominant mode of production.

artifact rather than integral to ongoing community identity and development. The "history" of the community, however, comes not from its external documentation and legitimation as an object or artifact of history, but from the persistent and continuing narration of its tradition and identity through its cultural production. Therefore, a community is historical or "traditional" where the communal narration, sharing, and perpetuation of history occur through the living community. In his formative and influential work, *Culture and Imperialism*, Edward Said identifies the significant link between access to voice and narration in the coherence of identity. Significantly, Said recognises the relationship between narration, identity, and the assertion of rights over place:[112]

> [S]tories ... become the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative ... The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.[113]

Thus, it is not geography alone, nor conventional history, but community narration that performs and generates the coherence, integrity, and dignity of community as a living and continuing event. The legitimacy of a community's claim to its resources comes partly from the stability of tradition, of story, and the importance of the relationship between community and resources in continuing that tradition and protecting the story of the land, of nature, and of the community. Such story is without "owners," unable to be personalised and privatised, but necessarily the process by which community is recognised. But this is not to suggest that tradition is

[112] In particular, see the discussion in Chapter 7.

[113] Said (1994): xiii. Referring primarily to ecological knowledge, Darrell Posey describes the relationship between narration, oral literature, and the transmission of knowledge and identity, in Posey (2004): 18, 30-31.

an obstacle to creativity, individual or otherwise, or that it is contrary to innovation.[114]

Narration establishes the community's locality, its "cultural boundaries" that can be "acknowledged as 'containing' thresholds of meaning that must be crossed, erased, and translated in the process of cultural production."[115]

In this way, community can be recognised.

5. Recognition

> [T]he success and meaning of the individual's life depend on identifying oneself with the group. This identification is the basis of the reciprocal relationship between the individual and the group. It is also the ground of the overriding emphasis on the individual's obligation to the members of the group; it enjoins upon him or her the obligation to think and act in terms of the survival of the group as a whole. In fact one's personal sense of responsibility is measured in terms of responsiveness and sensitivity to the needs and demands of the group. Since this sense of responsibility is enjoined equally upon each member of the group – for all the members are expected to enhance the welfare of the group as a whole – communalism maximizes the interests of all the individual members of the society.[116]

Recognition by Community

A community-based system of protection and custodianship that operates upon a "definition" of community according not to the constitution of the group but to the values and principles of the relations as asserted from within the community itself is therefore necessary:

> Thus the development of the theory of community places central importance on the actual principles that embody communitarian relationships and must be careful to avoid the prescription of the specific communities in which these bonds exist. If this can be achieved, then there is no need to engage in the often exclusionary and ethnocentric practice of selecting which communities are particularly worthy of the name.[117]

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[114] Note the discussion cautioning against this common misconception in Negus & Pickering (2004): 91-114.

[115] Bhabha (1990): 4. See also the critique of the colonising process of (historical) narration of Indigenous and traditional stories and tradition, and the way in which the histories and traditions of those communities are sentimentally fixed within the past, rendering the communities without history, in Guha (2002).

[116] Gyekye (1995): 156.

[117] Little (2002): 65.

Fundamentally, obligations are exchanged between and towards all, not conferred by the state upon the individual in need of protection. Obligations are constitutive of community, rather than reflexive and artificial constructions of the process of modernisation: "A single being is a contradiction in terms. Such a being, which would be its own foundation, origin, and intimacy, would be incapable of Being, in every sense that the expression can have here."[118]

In binding the international community in this way, obligations *erga omnes* may be the source of corresponding rights not only in the international community, but also in community groups that might otherwise be outside the model for full international legal personality. Thus, being or personhood is a process understood through community, and through mutual recognition, motivating obligations to cultural diversity within an international "community," as it were.

> All human cultures that have animated whole societies over a considerable stretch of time have something important to say to all human beings … cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time, are almost certain to have something that deserves our admiration and respect, even if it is accompanied by something that we have to abhor and reject.[119]

Recognition of Community

Community is rendered identifiable through social and political construction of the "traditional" and of its authenticity. The following chapter considers in detail the way in which the authenticity of traditional creativity is problematically constructed by intellectual property law. Through the construction of identity through the relationship to property, and the commodification of traditional knowledge as information capable of being traded, the dominant legal discourse demands markers of authenticity upon which to identify the community. Thus, communities not co-incident with the geo-

[118] Nancy (2000): 12.

[119] Taylor (1994): 66-74. Cited in Bhabha (2003): 165.

historical portrait of tradition are at risk of being excluded, despite legitimate claims to community resources:

> [W]hen the material stakes increase, particular indigenous persons and groups are called on to provide precise accounts of local social structures and cultural beliefs that necessarily have a "more or less" relationship to the ideal referent of "traditional customs and laws" and to anything actually occurring in their day-to-day lives. At some "to be announced" boundary, the "less" becomes "too little" and the special rights granted to indigenous persons give way to the equal rights granted to all groups in the multicultural nation.[120]

The legitimacy or "authenticity" of the community is staged by this process of conventional identification, and constrained by attachments to constructions of place, history, and authenticity in order to be recognisable, as it were, within the dominant regulatory system.[121] This process must be problematised in order to give effect to the process of recognition as a performance by a community, rather than the result of an "ideal" and historical community to be regulated and legitimated externally. It is necessary, therefore, to consider the way in which authenticity is "produced," in the context of intellectual property law and other discursive constructions of the "authentic" Indigene.[122]

The Obligation of Community, the Right of Identity: the Refrain of Recognition

> The clan (group) is (merely) a *multitude* (crowd)
>
> (*abusua yẽ dom*)
>
> Akan proverb[123]

> Rather than looking for a stupefying and infantalizing consensus, it will be a question in the future of cultivating a *dissensus* and the singular production of existence. A capitalistic subjectivity is engendered through operators of all

[120] Povinelli (2002): 57.

[121] The way in which this occurs within intellectual property law is considered in the following two chapters. The construction of community is also examined in the context of land rights (Chapter 7) and human rights (Chapter 8).

[122] Throughout the following chapters, the implications of attachment to place and historical markers will be examined in the context of intellectual property laws, and later in land rights.

[123] Quoted in Gyekye (1995): 161.

> types and sizes, and is manufactured to protect existence from any intrusion of events that might disturb or disrupt public opinion … Capitalistic subjectivity seeks to gain power by controlling and neutralizing the maximum number of existential refrains.[124]

Recalling the conventional perception of community as a nostalgic embodiment of safety, as discussed above, it is possible to identify how the concept has been devalued in favour of the international and individual "identity" that is indeed the normative principle organising the rights to intellectual property:

> "Identity" owes the attention it attracts and the passions it begets to being a *surrogate of community*: of that allegedly "natural home" which is no longer available in the rapidly privatized and individualized, fast globalizing world, and which for that reason can be safely imagined as a cosy shelter of security and confidence, and as such hotly desired … Identity sprouts on the graveyard of communities, but flourishes thanks to its promise to resurrect the dead.[125]

The following chapter will describe the way in which legal discourse distils information from the knowledge of community, in order that information may be commodified and exchanged in a regular and predictable way. In translating knowledge as "information," and in determining information as the "civilising" principle of a global society,[126] the forces of economic and cultural globalisation necessarily dictate principles of disclosure and revelation (of exchange). In turn, intellectual property laws dictate terms to developing countries and traditional groups from outside, laws that are not necessarily relevant or meaningful to traditional community values.[127] Neo-liberal doctrines of individualism arguably undermine the traditional values of community, and a neo-liberal democracy may even render community impossible:

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[124] Guattari (2000): 50.

[125] Bauman (2001b): 151.

[126] See the lauding of the information revolution in Rosenau (1998): 28-57.

[127] Dutfield (2003): 195-205 in particular. See also Drahos & Braithwaite (2002).

> Central institutions of modern society – basic civil, political and social rights, but also paid employment and the training and mobility necessary for it – are geared to the individual and not to the group. Insofar as basic rights are internalized and everyone wants to or must be economically active to earn their livelihood, the spiral of individualization destroys the given foundations of social coexistence.[128]

As discussed, community must be re-considered not merely as a geographical, and social manifestation of individual groups. Community does not simply manifest itself as a particular location, that is, a projection of community onto physical, proprietary place, but marks its territory and its history through the *refrains* in its cultural production and resources. In order to access effective *sui generis* rights to protect, manage, and limit its traditional knowledge within an international system, community must be a source of identity, identifiable, recognisable. In other words, if community is to be given legal effect then it must become the subject of rights rather than a mere projection of historical and geographical identity.[129] Community must be recognised.

"Imagining" Community Resources

As seen earlier, cultural interactions produce "locality" and space through local interactions that give effect to the autonomy of the particular community to which all individuals must refer. Therefore, the international legal system in which communities are to have capacity and authority must be a global order potentially beyond international or interstate market contingencies to command the bargaining process, and beyond the evasion of such order through multilateral or bilateral trade agreements: "An effective response to globalization can only be global. And the fate

[128] Beck & Beck-Gernsheim (2002): xxi-xxii.

[129] Bauman (2001b): 151.

of such a global response depends on the emergence and rooting in of a global (as distinct from "international", or more correctly interstate) political arena."[130]

The community model will achieve international legal efficacy through legitimate structures of obligations. This occurs not through defining individual instances of community or subjecting customary law to external legal regulation, but by allowing specific communities to assert capacity as community within the international public sphere and to self-govern resources according to customary laws internal to their social organisation.

> Empire can be effectively contested only on its own level of generality and by pushing the processes that it offers past their present limitations. We have to accept that challenge and learn to think globally and act globally. Globalization must be met with a counter-globalization, Empire with a counter-Empire.[131]

The increasingly privatised world in the context of globalisation is largely driven by the human rights rhetoric of individualism, and is similarly justified in terms of democratic rights, or "individual" rights. Community, on the other hand, must be understood in terms of mutual obligations, which arise throughout relationships between individuals, in the rectification of what is necessarily a "self-*in*sufficiency."[132] Importantly, "human mutuality and community rest no longer on solidly established traditions, but, rather, on a paradoxical collectivity of reciprocal individualization."[133] Sufficiency cannot come from the self, but only in the

[130] Bauman (2002): 85.

[131] Hardt & Negri (2000): 206-207.

[132] Georges Bataille also speaks of an insufficiency or incompleteness, upon which being is premised, not as a desire to be fulfilled or completed, but in a kind of dialogue between members of a community. This interaction is what constitutes being. In particular, see his development of the theory of general economy in the 3 volumes of *The Accursed Share*: Bataille (1988); and Bataille (1991). See also this notion of community in Bataille (1988). Maurice Blanchot provides an insightful reading of Bataille's theory of community: "By itself, ecstasy was nothing if it did not communicate itself and, first, did not give itself as the groundless ground of communication," Blanchot (1988): 17.

[133] Beck & Beck-Gernsheim (2002): xxi-xxii.

relationships with community: "a person is not a palm tree that he or she should be self-complete or self-sufficient."[134]

When considering the modernising technological community, therefore, while there is the necessary understanding of community as an ancestral cultural group, it is possible to conceive of community not as a limited, situated identity, but as the dynamic, organic, and momentous embodiment of community resources. Indeed, this is possible in spite of colonial and modern industrial fracturing of groups and dispersal of individuals because, as discussed, community is the living self-identification and mutual recognition that coheres and relates:

> [W]hether or not its structural boundaries remain intact the reality of community lies in its members' perception of the vitality of its culture. People construct community symbolically, making it a resource and repository of meaning, and a referent of their identity.[135]

While the concept of community must realise the collective cultural identity of groups despite dispersal of individual members through the external forces of colonialism, industrialisation, and modernisation, it is at the same time important not to result in what is a mere "attenuation" of community whereby "it is no longer an effect of the social relations and institutions" that are constitutive of an actual, identifiable group, and is somehow inferior to the more "real" community of actualised physical recognition and "face-to-face relations."[136] Furthermore, this concept of community differs from modern appropriations of political community, in that it signifies the internal coherence and differentiation according to customary law, rather than

[134] Translation of Akan maxim, Onipa nnye abe na ne ho ahyia ne ho. Gyekye (1998): 320.

[135] Cohen A (1985): 118.

[136] Amit (2002b): 6.

unifying a group of individuals as the basis for a common culture in identity politics.[137]

Modernisation and the information society allows for identification with community despite dispersal and possible physical alienation. Benedict Anderson applies this understanding to modern notions of nationalism,[138] and a similar operation of community can be understood in terms of the urbanised Indigene. To insist upon physical grouping and geo-historical identity is to insist upon sentimental notions of group identity and to deny traditional communities the right to development in the context of the contemporary information economy. In other words, the "imagined" community is one that is realised through the cultural and intellectual practices and actualities of its members. It is not an "invented" community, that is, it cannot be achieved by singular "inventions," but is "imagined" only through these relations: "for any community that extended beyond the immediately face to face incorporates this element of imagined commonality."[139]

Unless Indigenous and traditional communities are given the opportunity to assert difference as a community, rather than upon the basis of individual rights within that community, the unique claim of Indigenous and traditional communities with respect to resources cannot be realised.[140] Rather, such claims are assimilated from the starting-point of individual ownership of rights, including economic rights, cultural rights, and property rights. National and international obligations to that community to exercise customary management are unlikely to be adequately resolved within a

[137] Honneth (2003): 162 (discussing the work of Will Kymlicka).

[138] Anderson B (1983).

[139] Amit (2002b): 6.

[140] Marta Santos Pais, Director of Innocenti Research Centre, UNICEF, maintains that solutions for various and diverse issues for Indigenous children, including access to health, education, and so on, must take account of community as the fundamental reference for those children, and that failing to do so will arrive at unacceptable and potentially irrelevant solutions. See Logan (2004).

paradigm of westernised individual property ownership, in that systems based upon private intellectual property rights do not address the complex and challenging issues unique to a traditional community:

> The most effective initiatives include full and meaningful participation in decision-making processes at all levels and succeed in promoting respect for cultural diversity and protection from discrimination. They also recognize the close interaction among key elements in the indigenous world-view: the physical, mental and economic well-being of indigenous peoples, their freedom from exploitation, and their survival and development are intimately linked to the unhindered pursuit of their culture, beliefs and spirituality, as well as t access to their land and its resources.[141]

The following chapter will consider the politics of authenticating cultural output through the creation of intellectual property rights, where the identification of intellectual property signifies originality, expression, and genuine creation. As will be argued, intellectual property and other individualistic rights-based discourse, when applied to traditional knowledge, "disguise" the output and practices of traditional groups as uniform, discrete, pure, and as commodities. In other words, "collective" models are models of the corporatisation of traditional knowledge, without true realisations of community agency and the significance of customary law. Just as knowledge is not pure, neither is the category of community uniform, but the principles of interaction between customary law and international obligations to cultural diversity, at work in the model of community resources developed here, will provide the coherence, determinacy, and unequivocal framework necessary for the legitimacy of this model.

[141] UNICEF (2003): 3.

Chapter 2: The Grand Plan - Intellectual Property and the Interpretation of Knowledge

> Knowledge is and will be produced in order to be sold, it is and will be consumed in order to be valorized in a new production: in both cases, the goal is exchange. Knowledge ceases to be an end in itself, it loses its "use-value."
>
> Jean-François Lyotard.[1]

Introduction

The previous chapter set out the theoretical and critical basis for community, as distinct from the possessory and individualistic rendering of culture as property, and as commodities. The self-esteem and social worth derived from propertied success in the western world is incompatible with the principles of individual subjectivity premised upon community in traditional and Indigenous communal philosophies, where "the individual feels socially worthy and important because his or her role and activity in the community are appreciated. The system affords the individual the opportunity to make a meaningful life through his or her contribution to the general welfare."[2]

The possessory models, and the concepts of ownership and the ambitious self of western economic models, were considered in relation to the communal basis for individual subjectivity in the previous chapter. It was argued that, rather than deny the notion of "ownership" as such, it is important to acknowledge that traditional development of knowledge is usually through access (as appropriate according to the differentiation of a particular group) and incremental change, rather than through the

[1] Lyotard (1984): 4-5.

[2] Gyekye (1995): 157.

necessarily private production (in order to ensure authorship) that is central to intellectual property regimes.

Nevertheless, intellectual property law remains the persistent framework within which these discussions are constrained. This is principally because of the obvious connection between misappropriation of knowledge and its subsequent commercialisation, and the assistance of that process through intellectual property law. However, the "logic" of intellectual property as the framework for traditional knowledge protection is more firmly grounded than this one connection would suggest. An understanding of the legitimation and institutionalisation of the intellectual property narrative is a necessary and critical preparation for its rejection as the principal framework for traditional knowledge protection.

International Intellectual Property Rights: The fundamental norm

As noted in the introduction, intellectual property rights were rendered concerns of international trade through the conclusion of the WTO TRIPS Agreement,[3] annexed to the WTO Agreement of the 1994 Uruguay Round of trade negotiations of the GATT. Countries wishing to accede to the WTO are obliged to implement the basic provisions of TRIPS in order to access the subsequent trade advantages of WTO membership. In this way, TRIPS effectively controls the global distribution of, and trade in, information through the operation of intellectual property rights.[4] That is, intellectual property law remains a powerful organising principle for the development, recognition, distribution, and consumption of information.

[3] The text of TRIPs may be found at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

[4] Drahos (1995): 6.

Intellectual property rights and their enforcement also persist as key issues of economic and developmental concern in the ongoing trade rounds of the WTO, particularly in the Ministerial Declaration adopted on 14 November 2001, in Doha (Doha Declaration).[5] The Doha Declaration includes a mandate to review the patenting of biotechnology in the context of issues of biopiracy and the specific interests of Indigenous and traditional groups and developing countries.

Prior to TRIPS, an international framework for intellectual property standards was in operation in the form of the various instruments administered by the WIPO. The administrative role of WIPO was compromised by the fact that the organisation had no means by which to enforce its decisions. After losing allegedly billions of dollars through infringement of its intellectual property throughout the world, the United States argued for international protection of intellectual property rights (in light of their particular significance to international trade) at the Uruguay Round in the early 1990s.[6] The result was TRIPS, which came into effect, 1 January, 1995. TRIPS requires member nations to comply with international treaties and conventions protecting intellectual property, through the implementation of such provisions in national laws.

While many of the provisions of TRIPS reflect the requirements of earlier agreements, such as the Paris and Berne Conventions, it imposes additional requirements particularly with respect to new technologies. As part of the WTO

[5] As discussed, the Doha Declaration, was adopted on the final day of the Fourth Session, conducted in Doha 9-14 November 2001, with the mandate to address a variety of issues concerning international trade and economic development, including the marginalisation of developing and least developed countries. The Doha Declaration is discussed in more detail in Chapter 6.

[6] Pretorius (2002); Gervais (2003b).

Agreement, TRIPS is facilitated by more effective dispute settlement procedures with options of sanctions against signatory countries for non-compliance.

TRIPS has attracted substantial criticism for its emphasis on large corporations, their control of the global distribution of goods, and the "globalisation" of intellectual property rights arguably at the expense of developing countries and Indigenous groups.[7] TRIPS internationalises the social and economic dimensions of intellectual property rights towards a uniform approach to protection and to the flow of goods, criticised by some as an inappropriate generalisation in favour of the objectives and markets of industrialised western countries, while potentially destructive to the diversity of knowledge production and exchange in developing and least developed countries,[8] and in traditional and Indigenous communities (in both developing and developed countries).

Creating effective international protection of Indigenous cultural production, traditional knowledge, and biological resources is recognised by the international community as requiring urgent action.[9] However, the context in which those resources are "registered" by the international community (namely through international trade in "information" identified through intellectual property) and through which their commercial potential is realised (again through the creation of value through intellectual property schemes) has installed intellectual property as the seemingly rational and logical means by which to solve these questions. Thus, efforts to develop

[7] Drahos (1995); Pretorius (2002); Sell (2003); Dutfield (2003): 195-205 in particular. See also Drahos & Braithwaite (2002).

[8] Pretorius (2002); Dutfield (2003): 195-205.

[9] WIPO. Press Release 378/2004. "WIPO Member States Lay Foundations for Protection of Traditional Knowledge." 19 March 2004. http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_378.html

an international model generally adhere to intellectual property, at the very least as a means by which to identify the "value" and object of protection – information.

The international discussions currently under way within the forum of WIPO will be considered in detail in Chapter 4 where the documents and progress of the WIPO IGC[10] will be reviewed. Nevertheless, it is useful to recognise at this point the central role played by WIPO in focussing various platforms (biodiversity, food and agriculture, human rights) within the organising framework of international intellectual property law. For instance, in the Fifth Session of the IGC, staged in July 2003, discussions called for the increased acknowledgment of and coordination with other international instruments, including the CBD.[11] As discussed later, the most recent Sixth Session reiterates the need for an international multi-dimensional framework, but ultimately this is interpreted through the imperatives of international trade in intellectual property.

Before considering this international effort, it is necessary to understand why intellectual property presents such a powerful legal and normative discursive framework through which traditional knowledge protection seemingly must be understood.

The Big Picture: Intellectual Property and Representing Knowledge

Intellectual property law can be understood as a kind of narration or story of knowledge in western society,[12] representing creativity within a framework of criteria

[10] Activities and documents of the WIPO IGC are available at http://www.wipo.int/tk/en/

[11] The text of the CBD may be found at http://www.biodiv.org/doc/legal/cbd-en.pdf.

[12] This concept of narration of knowledge (and innovation) is drawn from Jean-François Lyotard's notion of oppressive and ideological meta-narratives that purport to represent the entire "story," but

for protection and justifications for monopolies.[13] It makes known the creative and innovative output of society and registers it within its system of recording and regulating the dissemination of that information. That which does not come within its criteria, frequently the case for traditional knowledge, does not register as creative output or innovation, as it were, but merely as "history" and on the periphery of the dominant narrative of progress.[14] The stability of tradition, the source of legitimacy for community and traditional innovation as seen in the previous chapter, is figured as contrary to creativity within governing models of advancement.[15]

In this way, intellectual property operates as what Jean-François Lyotard would call a "grand narrative," justifying itself as progress, harmonised, and total in its rendition of knowledge,[16] the narrative of innovation.[17] Lyotard recognises the interruptions of the little narratives (*petit récit*),[18] which threaten to delegitimise the authority of the grand narrative. That is, the "classic dividing lines" or categories of commodities of

necessarily leave exceptions out in order to achieve that totality – namely traditional knowledge in the case of intellectual property law. Lyotard (1984).

[13] See the discussion of the relationship between creativity and the rhetoric of intellectual property in Macmillan (2002); See also Macmillan (2003).

[14] Althusser (1970): 91-118.

[15] "It is a common misconception to regard innovation and tradition as diametrically opposed to each other. When innovation is valued as a defining characteristic of the creative process, tradition often becomes set up against it as inevitably static and unchanging. In this view, tradition inhibits, and is seen as an impediment to be overcome": Negus & Pickering (2004): 91. See also page 98, where the authors discuss the association of creativity with change and renewal, making responsibility to tradition and to its persistence an obstacle to creativity.

[16] Lyotard (1984).

[17] Lyotard describes science as the grand narrative of speculation, and the western model of democracy as the grand narrative of emancipation: Lyotard (1984): 31-39.

[18] Lyotard (1984): 60. See also the discussion of Royal Science and minor science in throughout the work of Deleuze and Guattari, including Deleuze & Guattari (1986); and Deleuze & Guattari (1987) (see the discussion of in the Introduction). The notion of a dominant narrative is also considered in cultural studies in non-western creative output. See, for instance, the collection in Prendergast (2004a), which is framed by Prendergast's introduction to "small literatures" in Prendergast (2004b): 14-16, 18. See also the discussion of "minor literatures" in the same volume, in Corngold (2004): 272-290. Similarly, the use of terms like "folkbiology" to refer to everyday understanding of biology as distinct from institutionalised science, shares aspects with this notion of the little narrative in its interest in sustaining local cultures and knowledge: See Medin & Atran (1999).

knowledge (copyright, designs, patents, trade marks) cannot contain the problems posed by traditional knowledge, nor indeed the proliferation in technologies that intellectual property purports to interpret within these categories.[19] Thus, despite the hold of intellectual property laws, "new territories are born."[20]

In the present discussion, these "little narratives" or "minor laws/sciences"[21] are suggested by the intrusion of customary laws of ownership, governance, and management that cannot be externally regulated by the grand narrative, but which threaten its authority as a universalising story.[22] Indeed, this model invigorates the recognition and significance of customary law despite its "absence" in legal institutions until now. This criticism of the grand narrative of innovation, intellectual property, undermines its assertion of rationalism and objectivity, and motivates not its incorporation of customary law, *per se*, but its delegitimation as the governing narrative of innovation.

As the grand narrative of innovation, therefore, intellectual property is legitimated and authorised as the objective system by which to demarcate what is "valuable" and therefore protected:

> Legitimation is the process by which a legislator is authorized to promulgate such a law as a norm. Now take the example of a scientific statement: it is

[19] For example, in relation to the problems with protection of software within pre-existing intellectual property categories, see Lessig L, (2000); Guadamuz (2002); Samuelson (1987).

[20] Lyotard (1984): 39. See also the resonances with the production of territory in Chapter 7. See also the discussion of threats to the legitimacy of intellectual property law in Chapter 9.

[21] Deleuze & Guattari (1986), (1987).

[22] Lawrence Lessig argued at a recent conference commemorating the 10th anniversary of the TRIPS Agreement, Geneva, June 2004, that the individual actions of music piracy are fuelled by unbalanced responses in expanded protection, in what he calls the extremism of the law and of actions to confront the law. Lessig (2004b). Arguably, this phenomenon raises the question of the legitimacy of intellectual property and stronger rights. The issue of legitimacy is implicitly made by arguments to resist intellectual property laws for the greater (moral) good. Such arguments were made by Vandana Shiva, in the same conference panel: Shiva (2004). The question of legitimacy is examined in more detail in Chapter 9.

> subject to the rule that a statement must fulfil a given set of conditions in order to be accepted as scientific. In this case, legitimation is the process by which a "legislator" dealing with scientific discourse is authorized to prescribe the stated conditions.[23]

Thus, intellectual property disguises this legitimation process, and represents itself as commonsensical and irrefutable. Indeed, to question otherwise appears an illogical challenge to progress and to civilised society itself.[24] In this way, intellectual property also "universalises" Culture,[25] whereby the objectives and justifications for the system, as set out in more detail in the following chapter, are deemed to be universal in appeal and desirable for all.

In particular, a critical conflict between intellectual property models of creativity/innovation and traditional and Indigenous practices, is the necessary simplification and commodification of innovation in the former. This and the following chapters consider the way in which precepts of authorship, self-expression, individuality, and control presume all individuals (and communities) desire the same experience of their creativity and will be rewarded in the same way. The "difference" of the community is suspect, unreliable, and unenforceable, whereas intellectual property law is seen to be certain, replicable, and predictable. The following chapter, for instance, considers the way in which the intellectual property framework renders the creative process a singular and simplified event (through principles of authorship,

[23] Lyotard (1984): 8.

[24] Dutfield (2003): 208-209.

[25] The use of the term here is capitalised, indicating a hierarchy of "value." In this way, the term is used without qualification of implicit class references or resonances of "high art" or significant knowledge (scientific benefit, and so on). This is distinct from the use in Chapter 1.

originality, inventiveness, novelty, and so on), producing "the illusion of singularity and therefore of universality."[26]

How then does intellectual property achieve this authority over traditional knowledge protection? Apart from the commercial implications of the knowledge in itself, as recognised in the economic potential of traditional medicinal knowledge of plants, the market for "authentic" Indigenous artwork, and so on, what facilitates the presumption of this perspective upon knowledge in the first place? How does an intellectual property model authorise the way traditional knowledge protection is discussed?

1. Author, Author! Legitimating Culture

As the grand narrative of innovation, indeed "knowledge," intellectual property is the *de facto* author of legitimate Culture in western society. Intellectual property recognises and authorises Culture, making it legitimate information for trade. In this way, the creation of intellectual property becomes synonymous with Culture and innovation, "as though there were some overarching legal recognition of originality."[27] On the other hand, traditional knowledge is un-authorised, un-original, and illegitimate according to this world view.[28] In its application, intellectual property law inevitably decides the distinction between art and artifact, invention and imitation, trade mark and decoration. In doing so, intellectual property impliedly documents the progress and civilisation of society, through the simplification and

[26] Wright (2001): 130. Similarly, later discussions of freedom of expression (Chapter 5) recognise the problematic application of this "right" to arguments against the customary control over traditional knowledge and restrictions upon its dissemination.

[27] Strathern (1999): 168-69.

[28] See the critique of the classical opposition between tradition and society in Negus & Pickering (2004): 91-114.

demarcation of Culture, while at the same time disguising the very selective process of that registration of Culture:

> National intellectual property laws are highly selective, and relate to products from which demonstrable material benefit accrues (authorship of literary works that bring in royalties; inventions with marketable application). A particular origin point in a process must be identifiable, and a particular originator.[29]

Intellectual property lays bare the process of creativity, and transforms and de-mystifies the knowledge of communities as legitimate information.[30] In rendering the "authenticity" of Indigenous and traditional knowledge within this narrative of innovation, the quality and value of that knowledge is inevitably transformed, compartmentalised, and "lost" within the "branding" effect, as it were, of intellectual property systems. But the "blame" for that loss of knowledge, now re-made as property, is constructed as resting with "identity" of the Indigenous and traditional group:[31] "the failures of public sympathy, state institutions, and lawful forms of property become the failures of local people to maintain their 'culture.'"[32] According to the narratives within which it is authenticated, if traditional knowledge (particularly ancient knowledge) is used by community it is almost a waste.[33] The value of that

[29] Strathern (1999): 169.

[30] See Marilyn Strathern's consideration of the way in which culture is de-mystified by this process of making known: Strathern (1999): 58.

[31] See the discussion of identity and ownership in Chapter 1.

[32] Povinelli (2002): 189.

[33] See for instance the arguments against repatriation where Indigenous peoples cannot guarantee the preservation of material to the same degree. See Simpson MD (2001): 198-199. Similarly arguments become relevant in the context of biodiversity conservation, and the way in which a perceived conflict between traditional use and preservation of the environment may be used in the debate. See in particular the ongoing conflict in Nevada, United States, between the Federal Government and the Western Shoshone people, and the way in which the Bureau for Land Management has framed the conflict in terms of protection of the environment in order to justify the confiscation. On the other hand, the Shoshone elders (the Dann sisters) argue that the use is itself preservation (this will become particularly relevant in the discussion of biodiversity in Chapter 6). For background on the Shoshone land battle see Domnick (2004) and Relph (2004). Note also the Western Shoshone Defense Project, www.wsdp.org.

knowledge, within western legal and cultural frameworks, is ascertained through constructions of its authenticity, its collectabilility, its objectification and commodification:

> Aboriginal painters are telling us how to look after our land. They are not people who trouble over the celebration of themselves. Their work is anonymous, except to the extent that they reveal their tribal origins in their work through, for example, their *rrark* or cross-hatching. The lauding of individual Aboriginal painters is very much a western response to Aboriginal art, and a facet of Aboriginal artistry which Aboriginal people find quaint.[34]

Preservation comes through commodification of knowledge as a fixed and legitimate object of "Culture," not as a performative and generative value with particular cultural effects for communities: "'culture' appears to denote a form of property."[35]

This has interesting connections to the criticism of "authenticity" in art exhibitions and museum curation. The process of self-legitimation that occurs through the categorisation of "intellectual property" might be understood through the process of categorisation that occurs with cultural artifacts for the purpose of identifying authenticity in "art." That which cannot be reconciled within that framework is "inauthentic," and museums will "choose that which *authenticates* over that which is authentic":[36]

> Authenticity … remains the rationale for a great deal of art-historical and museum practice. How has it got away with it? … It is done through the apparently down-to-earth business of identification and classification, which must always impose theoretical assumptions on whatever is classified, but without the assumptions necessarily being obvious. As natural historians found out before art historians, any identification system more ambitious than

[34] Golvan (1992a): 227. See also the discussion of the conflict between "design" as understood in Indigenous Australian culture and the designs in intellectual property law in *Minding Culture* (2003).

[35] Tamen (2001): 73.

[36] Schwartz (1996): 279. For an extreme example of this distance between the "authenticity" of the object and community, consider the staging of authenticity of the community as anthropological artifact in colonial exhibitions: Gibson (1998). Similarly, culture was authenticated through the use of staged photographs during colonisation: Edwards (2001): 157-180. See also Steiner CB (1995): 151-165.

> just numbering items as they turn up involves putting things into categories of some kind, and it is impossible to devise an extended system of categorisation without some theory about the subject under investigation. So early taxonomic schemes in natural history assumed that species were stable entities and could be described in terms of constant characteristics, but the constancy has turned out to be an untenable theoretical assumption.[37]

Similarly, intellectual property systems assume the constancy of the criteria for determining "intellectual property," and their applicability to all developments in forms of knowledge. The over-arching principles of the market and of what will be described as origination and in-imitativeness, present significant obstacles for the realisation of community resources within intellectual property frameworks.

2. Origination and In-imitativeness

Criteria for determining the existence of intellectual property may be summarised and understood more broadly as "origination" and "in-imitativeness," in addition to aspects of protection and enforcement relating to the market for intellectual property (such as the criterion of utility for patents and the calculation of finite periods of monopolies in respect of different intellectual properties).[38]

Origination will be used here to refer to the simplification of the creative process through the identification and individuation of author or inventor, the origin of the work, and the presumption of a finite, concluded, and indeed lifeless material form. Therefore, criteria such as authorship and material form in copyright, inventorship, and material form are indicated by the notion of origination.

In-imitativeness may be understood as describing the criteria through which the apparent singularity of the work is presented, including the requirements of originality, inventiveness, and novelty – the construction of a simplified "originality."

[37] Phillips D (1997): 96.

[38] These key qualities of intellectual property that are developed here – origination, in-imitativeness, and the market – are considered further in the following chapter.

Crucially, in-imitativeness is not the same as inimitability. While inimitability may suggest uniqueness and originality, it is perhaps not in the same "economic" sense. The originality imagined in intellectual property law is strengthened through imitation. Indeed, to be imitated secures the object's singularity and semblance of originality within intellectual property systems. On the other hand, as discussed in the previous chapter, inappropriate imitation of traditional knowledge intrudes upon community identity and may compromise the integrity of the knowledge. This suggests an important "inimitability," as it were, of the subject matter of community resources in this respect, in that the knowledge is transformed in the reproduction. As Peterson J famously stated, "What is worth copying is worth protecting."[39] That is, what is worth copying has value in trade, a fixity that must be protected. The "inimitability" of community resources, therefore, paradoxically eschews protection within this logic.

Furthermore, the attachment to origin and singularity recalls the western construction of identity through possessory relations, including the self-possession[40] of expression. It is this same construction of identity, of racial essentialism, that threatens the "authenticity" of art seen to be collaborative with non-traditional individuals.[41] The legitimacy or "authenticity" of the "knowledge" comes about through the very misappropriation of culture against which protection is sought. Capturing traditional knowledge within this system would at once both miss the fundamental subject matter

[39] *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610 per Peterson J.

[40] Note John Frow's use of the term self-expression to understand the western view of property as "a primordial property right in the self which then grounds all other property rights": Frow (1995): 149. See also Coombe (1995): 251. For a discussion of property in personhood and the notion of possessive individualism see Davies & Naffine (2001): 3-15.

[41] See the discussion of ethnocentric rejection of Indigenous Australian art as "inauthentic" where there is seen to be collaboration with art advisers as "authorities": Michaels (1994): 160.

of community and "civilise" (as commodities) the traditional knowledge and resources of Indigenous and traditional groups.[42] In staging authenticity in this way, community is restricted to particular constructions of history, place, and creativity, in order to be rendered meaningful within intellectual property systems.

The Balance of Trade

It remains a fact, however, that intellectual property presents the key framework to which efforts to achieve protection for traditional knowledge currently refer, in so far as intellectual property laws have become increasingly part of the international legal structure of trade. Intellectual property laws are justified and interpreted in terms of facilitating trade. Indeed, for intellectual property to apply, the starting-point is, *de facto*, that knowledge must be capable of trade in order to warrant protection. It is the economic value of knowledge that justifies its protection, and the need to sustain the market that motivates the broadening of that protection.[43] Thus, while credited as motivating and encouraging creativity and innovation, intellectual property law must also ensure the marketplace exists for those ideas. To maintain the market, intellectual property law creates an artificial scarcity for information, or for what is often referred to as a "public good."[44] Intellectual property law creates the scarcity that ensures the

[42] Edward Said speaks of the importance of the expropriation of Indigenous culture to empire: Said (1978); Said (1994).

[43] Dutfield (2003): 66, 208-210.

[44] The construction of information as a global public good (in other words, it is non-rivalrous, non-excludable, non-crowdable) is found throughout the current debate over open access models (derived from open source software development) for scientific publishing, scientific research, and biotechnology. See the discussion of information as a public good, and the relationship to intellectual property laws, in Vaver (1997): 3-6; Lessig (2001): 20-21. See further the discussion of open access models in Chapter 5.

need for exchange, the desire for the information in the marketplace: "Cultural production can be seen as just that, production of commodities for the marketplace."[45]

1. Exchange values

The special kinds of interests and objectives that must be met by any proposed system of protection for traditional knowledge are not necessarily captured or realised by the conventional protection regimes of intellectual property law. The "non-ambitious"[46] character of community resources, together with the "shared" or communal process of knowledge development, is to a large extent inconceivable within the economic efficiency of international intellectual property law. Indeed, any attempt to delimit traditional knowledge, within the conventional private ownership that is protected by intellectual property regimes, may be described as the "fallacy of universality"[47] – that is, the assumption that intellectual property rights are equally good in all environments. In this framework, the rhetoric of "heritage" and "culture" defers the meaning of traditional knowledge within the private and economic ambitions of intellectual property.

To understand this intrinsic and fundamental conflict, and the need to depart from intellectual property in order to achieve effective autonomy for communities, the discursive might of intellectual property law must be examined. Intellectual property law has been rendered the "legitimate" and global narrative for the protection of knowledge, thus constraining the understanding of knowledge with economic models of information production and exchange. In other words, intellectual property rights

[45] Wright (2001): 116.

[46] This term is used to indicate a departure from ambition, understood as indicative of the competitive, individualistic, possessory model of identity, as distinct from the collective subjectivity of community.

[47] Laddie (2003). Sir Hugh Laddie made this statement referring to the application of conventional patent regimes to developing or least developed countries.

arise, or at least become meaningful, only through dissemination. For example, copyright shows that while rights may subsist in an unpublished work,[48] generally speaking, the regime works through the exchange or balance[49] between protective monopolies and disclosure. Intellectual property laws facilitate that exchange, and intellectual property requires this exchange with the "other" in order to come into being.

2. Justifying values

The delimitation of traditional knowledge within the intellectual property system is seemingly legitimated and validated through the presumptions that are concealed in that system. These presumptions are sustained and circulated through justifications based upon arguments of natural justice, incentives for creativity and innovation, and mitigation of risk in an increasingly economic analysis of intellectual property rights and the investment in innovation.

1. Nurtured justice

First, intellectual property laws are frequently justified as moral and "natural,"[50] and intellectual property rights are presented as the reward for honest labour and skill. They are integral to the expression of the individual will, and to the condemnation of

[48] Unpublished works are referred to in Articles 5 and 15 of the Berne Convention for the Protection of Literary and Artistic Works, 1886, available at http://www.wipo.int/clea/docs/en/wo/wo001en.htm. The relation of TRIPS to the Berne Convention is provided in Article 9 of the TRIPS Agreement.

[49] The Introduction introduced this principle of "balancing" in intellectual property law, which has become increasingly important in recent debates relating to the "knowledge economy." As discussed, the notion of "balancing" interests between restriction of knowledge (right-holders) and its dissemination (users) occurs throughout the literature.

[50] Article 27(2) of the Universal Declaration of Human Rights states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This moral basis for protection is borne out by the language of intellectual property laws, including "fair use" or "fair dealing," where the taking would be just in copyright law. Similarly, the rhetoric of "free-rider" and "piracy" in current debates over music copyright, file-sharing, and so on, rely upon these assumptions of a natural right of property. This rhetoric of fairness underpins natural justice arguments, and indeed arguments for adequate economic returns regarding the principle of investment in intellectual property rights.

the appropriation of that labour. In this way, intellectual property rights are put forth as incontrovertible rights of natural justice:[51] "Without this barrier, innovation is like a crop in an unfenced field, free to be grazed by competitors who have made no contribution to its cultivation."[52]

Within an intellectual property framework, traditional knowledge and traditional expressions of culture begin to look like the work of an individual; however, to process traditional knowledge in this way is to do a violent injustice to the diversity within traditional and Indigenous communities.[53] It is to render diverse communities as uniform, and indeed stereotypical, individuals. Gyekye identifies the restriction such "communalism" may have upon the true expression and autonomy of community, and the underlying assumptions necessary to make such generalisations of community:

> Scholars, usually from noncommunal social backgrounds, say about communalism (or communitarianism) that it offers no room for the expression of individuality, assuming that individuality is submerged by communalism, and that communalism is antithetical to individualism.[54]

The rendering of community resources as proprietary relationships between individual producers and their objects (of trade), according to intellectual property objectives, arguably undermines the generative relationships between community members and

[51] The entitlement to the protection of one's creativity output, considered a "natural right," is recognised in Article 27(2) of the UDHR: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[52] From the Report of the Australian Prime Minister's Science and Engineering Council (PMSEC), *The Role of Intellectual Property in Innovation: Volume 2, Perspectives*. See PMSEC (1993): 61. The PMSEC continued from 1989 until the final meeting, 10 December 1997, after which its role was incorporated into the ambit of the Prime Minister's Science, Engineering and Innovation Council. http://www.dest.gov.au/archive/Science/pmsec/Pmsec.html This particular passage is striking in its reliance upon the rhetoric of nature and agriculture, seemingly uncontroversial examples of humankind's labour and reaping of "just" products.

[53] Barron (2002). See also the discussion in Chapter 1.

[54] Gyekye (1995): 154. In this statement, Gyekye provides an interesting rejection of the interpretation of community (as a threat to individuality) of critics such as Zygmunt Bauman, considered in Chapter 1.

between communities and resources, rather than achieving the necessary protection of resources in terms of relationships to the community.

2. Creating control

The justification of intellectual property rights as rights of natural justice informs a further presumption underlining intellectual property law, that the creation of rewards[55] and granting of controls over one's intellectual property is an incentive to create and innovate.[56] This aspect of the economic analysis of intellectual property[57] suggests a presumption of an underlying efficiency in the model,[58] which in turn proposes to justify the projected harmonisation of international intellectual property laws for the purposes of the efficiency and certainty of international trade.[59] The supposed risk of creativity (financial, labour, and otherwise) is countered by the perceived certainty that intellectual property promises through these rewards and conferral of control.

In this way, the artificial scarcity necessary to create the markets in what is essentially an inexhaustible good (information, as it is broadly understood) is achieved, correcting the inefficiencies otherwise posed by unregulated and uncontrolled

[55] This notion of rewards for creativity will be confounded in the discussion on "freedom" in Chapter 5.

[56] See an early exposition upon incentive theory in intellectual property law in Nordhaus (1969). In relation to the creation of artificial scarcity, Landes and Posner (2003) explain: "Information is a scarce good, just like land. Both are commodified – that is, made excludable property – in order to create incentives to alleviate their scarcity" (374). The accreditation of intellectual property with a direct role in innovation and technological change persists throughout the literature, indicating the ongoing conceptualisation of knowledge development within these frameworks: Kanwar & Evenson (2001). Compare the alternative model of "commons-based peer production" in Benkler (2002).

[57] Note that Landes and Posner (2003) argue that the economic analysis of intellectual property law is frequently and problematically simplified as one of incentive and access. See in particular Chapter 1. This aspect of the economic analysis is nevertheless emphasised in the present discussion as having critical impact upon traditional knowledge protection and the processes of development and innovation in Indigenous and traditional communities.

[58] See Cooter & Ulen (2004), where the authors argue that information has a distinctive quality, making the creation of monopolies efficient as well as providing important incentives to continue creation.

[59] Dutfield (2003): particularly 195-205.

innovation. This interaction between incentive mechanisms (including the mitigation of risk and conferral of control through the calculation of monopolies in return for investment) and the creation of markets for information goods can be traced through the increasing corporatisation of research and intellectual output.[60]

Furthermore, the incentive justification presumes similarly simplistic models of innovation and creativity, for which the source of innovation is singular, the development linear, and the control personal. These models of development are not necessarily compatible with, or relevant to, traditional and Indigenous communities, a conflict pursued throughout the following chapters:

> The principal rationale of intellectual property protection is to provide a commercial incentive for inventiveness and creativity. It also provides an incentive for the disclosure of inventions and creative works. The various intellectual property statutes establish specific periods of time during which a rights holder is immunised from competition. At the end of that period … the invention or the design will be in the public domain. Indigenous peoples are not primarily concerned with the commercial exploitation of their creative works, but on occasion with the prohibition or restriction of commercial use of creative activities and knowledge which may have sacred significance.[61]

The apparent common-sense attached to the incentive arguments, when assimilating traditional knowledge within intellectual property models, belies the fundamental presumptions of information for commodification. Indeed, the objectives of intellectual property law appear to be the industrial activity itself, the management of its market, and the balance of risk and returns. Conversely, the objective of community resources might be more appropriately, and indeed paradoxically, understood as the protection of traditional knowledge from the industrial activity itself: "The first concern of indigenous peoples is that their right NOT to sell,

[60] Dutfield (2003). See also Sell (2003); Drahos & Braithwaite (2002).

[61] Blakeney (1997): 300.

commoditize, or have expropriated from them certain domains of knowledge and certain sacred places, plants, animals, and objects be respected."[62]

3. The cultural value of risk

A further legitimation for intellectual property systems, and indeed the expansion of the scope of protection, comes from the increasing significance of investment in innovation and the perceived justice in mitigating the risk involved. The calculation of regulatory mechanisms by which to manage risk, such as the creation of specific terms of monopoly in intellectual property law, corresponds not only to decisions on the risks inherent in innovation, but also to the "value" of those risks and indeed the "Culture" produced: "To one extent or another, all risk assessments involve the calculation not just of odds, but of the value of those odds ... Cost, however, is a subjective matter."[63] As discussed, the authorisation and authentication of "Culture" is a process critical to these calculations. Thus, risk is not merely uncertainty, as suggested by the self-legitimating narrative of intellectual property law, but is partly constructed through the processes of evaluating and hierarchising innovation in western culture. In other words, the public discourse of risk, recognised in the work of Ulrich Beck,[64] has been appropriated as a universalising rhetoric of regulation.[65] The individual has become collectively responsible, but has no say in the matter.

[62] Posey et al (1995): 893.

[63] Steele (2004): 24.

[64] See, for instance, Beck (1992); Beck (1999); Beck (2000).

[65] This is particularly apparent in environmental and intellectual property laws applied to emerging technologies, particularly gene technology, where the uncertainty of the scientific paradigm is responded to by the certainty conferred by legal regulation as to release and so on. For a comprehensive account of legislation and common law in this area, see Cain (2003).

This very rhetoric of the risk of investment extends to other "risks" of unregulated (or differently regulated) innovation, including predicted declines in creativity,[66] and more importantly, loss of competitiveness in the information society.[67] Similarly, the exclusion of certain aspects of traditional knowledge from the public domain, according to customary law, provokes reactions reliant upon risk, and predictions of chaos where access to that information is denied.[68] The grand narrative of innovation is always already rational, and the suggestion of alternative conceptualisations of knowledge and value are therefore *a priori* uncivilised, unprogressive,[69] and "superstitious"[70] – an incomprehensible risk.

3.1 Risking tradition?

These underlying principles of the present system appear to mark the irrelevance or inapplicability of intellectual property frameworks and economic models to the particular problems posed by traditional knowledge. This form of "social contract" or quid pro quo suggested by economic analyses of intellectual property, and the balance

[66] Richard D Parsons, of AOL Time Warner, made the following statement to the US Senate Hearing 107-283, *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You*, conducted 3 April 2001, arguing the existence of a direct relationship between intellectual property protection and creativity: "[W]e know that where there's no effective copyright protection, there are no creative enterprises": Parsons (2001). On the other hand, Lawrence Lessig supports intellectual property systems but recognises that there is creativity outside the ambit of intellectual property laws: "We live in a world that celebrates "property." I am one of those celebrants. I believe in the value of property in general, and I also believe in the value of that weird form of property that lawyers call "intellectual property." A large, diverse society cannot survive without property; a large, diverse, and modern society cannot flourish without intellectual property. But it takes just a second's reflection to realize that there is plenty of value out there that 'property' doesn't capture": Lessig (2004a): 16. Lessig's approach here is important, because the current work is not proposing the abolition of intellectual property law, but is rejecting the universalisation of knowledge practices and the unproblematic application of intellectual property law to traditional knowledge. That is, the question here is not one of simple information, but of community, and of customary law as itself "traditional knowledge," as set out in Chapter 1.

[67] For instance, the UK government declares the role of its Patent Office to be "to help to stimulate innovation and the international competitiveness of industry through intellectual property rights" http://www.intellectualproperty.gov.uk/std/resources/ip_organisations/ukpo_database_services.htm

[68] Kaplinsky (2003).

[69] Dutfield (2003): 208-209.

[70] Kaplinsky (2003).

between users and producers,[71] is "inefficient" in a community context. While all members of a community may not necessarily contribute to a "product,"[72] as realised by intellectual property models, this does not justify differences in the distribution of custodianship with respect to that knowledge. Custodianship is not individualised, and is not personal, but is according to shared values within the community.

The importance of the management of risk and the attending certainty the law introduces into innovation, recalls the contrast drawn in the previous chapter between the privileged discourse of progress in a future-oriented society, and the nature of custom in traditional communities.[73] Intellectual property law, the grand narrative of innovation, purports to mitigate the risk apparently assumed by an individual, reterritorialising that risk as a global concern of the protection of information from piracy and global theft. Indeed, the rhetoric has become even stronger in the current political climate, with music piracy now incriminated through alleged links to terrorism.[74] Everyone assumes the global risk of terrorism through the piracy of music, it would seem, even the 12 year-old file-sharer swapping games.[75] The age of informationalism is indeed upon us:

> We are living in a time characterized by the rise of the information society in its diverse reality. The foundation of this society is informationalism, which means that the defining activities in all realms of human practice are based on

[71] Recall the introduction to the notion of "balance" in international intellectual property law in earlier discussions. This notion of balance will become useful in discussions regarding freedom of expression, in particular, in Chapter 5.

[72] This may be due to a number of reasons, including differences in individual ability, gender, differentiation within the community as to access and custodianship of knowledge, and so on.

[73] Note also the extension of this concept of risk in the context of international environmental discourse and biodiversity in Chapter 6.

[74] See Boliek (2004); "Piracy linked to terrorism" (2003); Rangaraj (2003); Is piracy funding terrorism? (2004).

[75] See the on-line comments on this story at Gnutella News, Interpol IDs Piracy Links to Funding of Terrorism (2004), available at http://www.gnutellanews.com/article/12476.

> information technology, organized (globally) in information networks, and centered around information (symbol) processing.[76]

Through this global risk collective, the risk of the individual risk-taker is deterritorialised and reterritorialised as the collective risk of the information society. Distinct from this globalisation of risk, for traditional and Indigenous communities value of resources is constituted by the intrinsic relationship between community and resources as the expression of culture and the responsibility to tradition, through which the territory of community is produced.[77] Through the imposition of intellectual property frameworks upon traditional knowledge development, the protection of traditional knowledge is deterritorialised as the responsibility of the community, to be managed according to customary law, and reterritorialised as the global risk of natural and cultural resources. The ultimate means of achieving the necessary consensus upon the nature of such risk, and the way to manage that risk, is the grand narrative of innovation – intellectual property law. In this way, intellectual property law becomes the "gatekeeper" of resources.[78]

Related to this shift is the increasing cooperation between states and industry in order to enforce this system of risk-management upon individuals and other countries.[79] Controversial events regarding access to medicines demonstrate the manifestations of innovation as a collective risk, in the capacity of states to act on behalf of the powerful pharmaceutical industry. For example, in April 2000, the US Government

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[76] Castells & Himanen (2002): 1.

[77] Chapter 7 examines further the concept of territory as constituted by community practice and culture. See also De Certeau (1988) on the relationship between physical place and cultural space. Chapter 1 of this work introduced the essential problem of reconciling the community knowledge and innovation practices as the "space" of community (including connections with place, habit, and the past) with the individualisation attached to modern notions of development and trade efficiency. In this regard, see also Lyotard's discussion of the concept of development in *The Inhuman*: Lyotard (1991).

[78] IPCB (2004b).

[79] Dutfield (2003): Chapter 5.

requested a WTO dispute resolution panel to consider whether a provision of Brazil's patent law contravened obligations under TRIPS, in the context of a battle over the production of generic forms of patented drugs.[80] This capacity is particularly relevant in the patenting by multinationals of traditional knowledge in medicines and agriculture. Nevertheless, while access to enforcement may be dominated by those industries most powerful and in the "national interest" of the nation-state, it should not be overlooked that such mechanisms have also been engaged by national governments in order to enforce rights of Indigenous and traditional groups to local knowledge. For instance, the revocation by the United States Patent and Trademark Office (USPTO) of WR Grace's Turmeric patent[81] occurred after India's Council of Scientific and Industrial Research (CSIR), under the Department of Science and Technology, Government of India, filed for re-examination.[82]

While conventional intellectual property regimes concentrate upon the rights to property that vest within the individual risk-taker (investing in the research, devoting the time, skill, and labour, and so on), those laws mitigate that risk through the creation of exclusive monopolies that act as a precaution against the loss of investment (financial or otherwise). The subject matter of protection is increasingly informed by the impact of investment (in research and development) and technology (in copying and dissemination), rather than qualities inherent in the knowledge. It is debatable, therefore, whether intellectual property laws are concerned not with the knowledge as such, but with the creation of a market for that knowledge and the

[80] Eventually formal WTO litigation was abandoned in favour of a bilateral consultative mechanism. See the Office of the US Trade Representative (USTR) Press Release. 25 June 2001. See also the simultaneous press release, 25 June 2001, from the Pharmaceutical Research and Manufacturers Association (PhRMA).

[81] US Patent 5,401,504: Use of turmeric in wound healing.

[82] See the discussion in Walker (2001).

efficiency of its trade. Thus, the risk is reterritorialised as a collective risk in global public goods and the responsibilities of Indigenous and traditional communities to tradition are disenfranchised – "resourceless"[83] and "landless."[84]

The Knowledge / Information Polyphony

> Knowledge in the form of an informational commodity indispensable to productive power is already, and will continue to be, a major – perhaps *the* major – stake in the worldwide competition for power. It is conceivable that the nation-states will one day fight for control of information, just as they battled in the past for control over territory, and afterwards for control of access to and exploitation of raw materials and cheap labor. A new field is opened for industrial and commercial strategies on the one hand, and political and military strategies on the other.
>
> Jean-François Lyotard, 1979[85]

These comments from Lyotard are striking in their resonance with the dilemma of compiling knowledge as information for exchange. This relationship between knowledge and information commodities, introduced earlier, is a dilemma at the centre of controversies raging over access to information, technology, medicines, and protection for traditional knowledge.

More than two decades later, in *The Information Age*, Manuel Castells suggests that informationalism is fundamental to the construction and maintenance of society, and has become the way in which human activities are understood and measured.

> In this perspective [informationalism], societies will be informational, not because they fit into a particular model of social structure, but because they organize their production system around the principles of maximizing knowledge-based productivity through the development and diffusion of

[83] See the concept of "resourcelessness" discussed in the Introduction in Vellacott (1982): 32.

[84] In other words, the Indigenous and traditional community is displaced from the fundamental means for its self-expression and sustenance of identity and integrity, the means by which it expresses community "space" and territory (explored further in Chapter 7).

[85] Lyotard (1984): 5.

> information technologies, and by fulfilling the prerequisites for their utilization.[86]
>
> What is the ethical foundation of informationalism? And does it need an ethical foundation at all? … [T]he corporate ethos of accumulation, the renewed appeal of consumerism, are driving cultural forms in the organizations of informationalism. Additionally, the state and the affirmation of national/cultural collective identity have been shown to muster decisive force in the arena of global competition.[87]

What is the ethical foundation of information?

1. The Ethics of Information

The introduction to this work suggested the paradoxical nature of attempting to create protection for traditional knowledge within a system that facilitates its appropriation and removal; that is, the system of intellectual property. Indeed, there is no ethical accountability built into systems of intellectual property, to govern the way in which legitimate intellectual property is created, other than the criteria for eligibility for that protection, such as certain exclusions to patentability, or the criterion of originality in copyright law. Nevertheless, these criteria are not conditions of ethical responsibility, but administrative conditions for the purposes of the creation of intellectual property rights.

If there is an "ethics" to intellectual property, where might that occur? Indeed, does the system of intellectual property attempt to present itself as ethical, in so far as it seeks to reward ambitious, innovative, and creative individualism within society, and to regulate the conditions under which those "ideas" are shared so that individuals receive their just deserts? In other words, if the condition of "information" is the ethical starting-point of intellectual property law, then the ethics of its application to traditional knowledge protection is perhaps questionable.

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[86] Castells (2000): 219-220.

[87] Castells (2000): 213-214.

Intellectual property simplifies objects of information from society's knowledge.[88] Whereas knowledge may be ambiguous, fluid, inconstant, works of intellectual property may be presented as absolute, discrete facts, as "scientific" objects.[89] The "purity" of scientific discourse in the industrial revolution, where science was regarded as the arbiter of truth,[90] has been inherited, in the information age, by the systems for the regulation of that information. The effect of this discursive action upon community resources is to regulate community, transforming it "into a quantifiable and regulatable space" and transforming history into "the normality of an observable and readable system."[91] What is suggested throughout this work is that this attempt to reduce and assimilate community resources will nevertheless be overcome by the "refrain" of community and its interruption of efforts to simplify and regulate its authority.

Earlier arguments introduced the notion of intellectual property as the grand narrative[92] of innovation (and indeed of Culture) through which our cultural world is mediated and interpreted, and ultimately legitimated. It is through this arbiter of knowledge, intellectual property, that knowledge is translated into identifiable,

[88] Importantly here, it is the assertion that this "information revolution" is a function of the regulatory attempts to manage and deal with the technological capacity for information, and is not a function of the technology itself. While information is perhaps more accessible, more replicable, more certain through technology, technology does not limit the subject's processing of that information in the possibly "memetic" way necessarily imagined by models of legal regulation. That it is perhaps necessary for intellectual property law to categorise and disguise knowledge as information is not in dispute. But what is in dispute is whether this is the appropriate way by which to understand traditional knowledge. See Guattari (1995a): 5.

[89] This objectification of knowledge reaches an extreme in the popular understanding of memes, introduced in Dawkins (1989). For a critique of memes and memetics as denying individual agency in thought, see Barbrook (1996).

[90] Note also David Suzuki's challenge to the scientific paradigm, in the context of traditional ecological knowledge (explored in more detail in Chapter 6): Suzuki (1994): xxi-xxxv.

[91] De Certeau (1988): 89. Eduardo Cadava also speaks of the necessary "loss" in order to achieve representation, in his work on the photography of history and the attempts to document and (re)present the real: Cadava (1997).

[92] Lyotard (1984).

recognisable, exchangeable, commodifiable, and above all, legitimate objects of information. However, knowledge is not independent and distinct, and the rendering of knowledge as commodities of information through the workings of intellectual property law is problematic. This is particularly so when addressing the fundamental subject matter of the concerns of Indigenous and traditional groups. Intellectual property, therefore, disguises the subject matter of protection as uniform, pure, and discrete – unrelated, as it were. Intellectual property law defers the community and displaces the relationship in community resources. Knowledge, on the other hand, implicates the community and makes it present. Knowledge is not pure.[93]

In representing the truth or authenticity of objects of information with such "authority," intellectual property is also incriminated in the process of authenticating traditional knowledge and Indigenous art works, for example. The means by which to do so come from conventional intellectual property models,[94] where the "otherness" (and creatorship) of these exotic objects is authenticated, authorised, and legitimised for exhibition to the knowledge economy. As Appiah might suggest, the "difference" in these objects is refined, scripted, and authored by this means by which it is recognised and registered.[95]

Thus, intellectual property law, with its documentation and compartmentalisation of knowledge as the legitimating system of creativity and innovation, is vested with trustworthiness, reliability, replicability. On the other hand, traditional and Indigenous communities, with incremental and shared processes of development and innovation,

[93] Note the problems with categorisation introduced in the first chapter and considered in relation to community in the second.

[94] Examples of the way in which intellectual property determines the authenticity of traditional knowledge include the use of certification marks, or marks of authenticity. See the discussions in Wiseman (2001); Wiseman (2000); Wells (1996); Golvan & Wollner (1991); Gough (2000).

[95] Appiah (1992).

(un)original information, and non-western documentation, are uncertain, untrustworthy. Similarly, the possibility for incorporating customary law into systems for protection is not readily ascertained, arguably because of its considered unenforceability and uncertainty. The exploitation and use of objects will not register in a customary world.

The seemingly "rational" deterritorialisation of intellectual property law renders traditional knowledge no longer "knowledge," but property, through the reterritorialisation of intellectual property laws and systems upon Indigenous and traditional groups. This "property," by definition, is inaccessible to traditional community by virtue of this process of reterritorialisation. In other words, communities cannot access these systems unless they become appropriate individual subjects under intellectual property law, unless they become corporatised or industrialised ambitious legal persons. Intellectual property systems would therefore reterritorialise not only traditional knowledge as information commodities and property, but also communities as individuals:

> The power of control is predicated on the decoding (the rendering immanent of signs as vectors of indeterminate potential) and deterritorialization (the drawing off of the event from its general-particular spaces of expression and, in this case, its consignment to a distributed, intervallic space of its own). The power of control is decoding and deterritorialization, *delivered* (ready for catalysis, into a potentialization-and-containment in a new space; ready for recoding/recodification and reterritorialization). Control is modulation made a power factor (its flow factor). It is the powering-up – or powering-away – of potential. The ultimate capture, not of the elements of expression, not even of expression, but of the movement of the event itself.[96]

Traditional knowledge and, furthermore, the relational community resources, will be decoded and then recoded, rationalised, and translated into the economic and commercial information of intellectual property law, the grand narrative of

[96] Massumi (2002): 88.

innovation. This deterritorialising process undermines and "powers away" the potential of community, and assimilates it within the intellectual property regimes. In other words, to access rights and, fundamentally, to enjoy those rights, the community is re-made according to the priorities of intellectual property law – becoming information.

2. Mercantilization of Knowledge

Lyotard speaks of the "mercantilization of knowledge,"[97] whereby the economic exchange of information commodities becomes the governing organising principle of society, compromising the role of the nation-state as investor, arbiter, and guarantor of rights and freedoms. The nation-state is thus secondary to the governance of the market. When it comes to information, "will the State simply be one user among others?"[98]

In particular, intellectual property rights remain most relevant to, and a significant priority for, industrialised countries, while paradoxically undermining the cultural capital in intellectual production for developing countries and Indigenous and traditional groups. Therefore, intellectual property rights may be conferred by national legislative interests but assume their importance by reference to international market access and trade:

> [F]ailure to provide for balanced protection of intellectual property can create distortions and impediments to legitimate trade. The barriers to market access caused by high tariffs and similar protectionist measures are immediate and obvious. The role of intellectual property in ensuring genuine market access is more subtle, but no less important. The effective absence of intellectual property protection can lead to the virtual denial of access to legitimate

[97] Lyotard (1984): 5.

[98] Lyotard (1984): 6. This becomes relevant again in Chapter 5 where the discussion of freedom suggests the covert regulation of that freedom not only through expanded intellectual property rights but also through the market (as in media monopolies and so forth).

> markets for some products, and can inhibit productive investment associated with the transfer of new technologies.[99]

The intellectual property regime protects, on the one hand, those knowledge goods that represent the commercial investment of research and development (such as patents, trade secrets, designs, and copyright)[100] and on the other hand, those linked to product differentiation and branding (such as trade marks and geographical indications).[101] The emphasis on multilateral cooperation with respect to intellectual property rights protects that information of economic value when disseminated in the marketplace, and indeed depends upon that dissemination in order to enliven those rights (as in the monopoly in exchange for disclosure granted by patent laws).

Intellectual property rights, therefore, do not necessarily address relevant priorities, values, or objectives for developing countries and for Indigenous and traditional communities. In particular, such rights do not protect the kind of "use" that might be relevant to those groups nor imagine the kind of "product" that might be of value. The social and economic bases for intellectual property regimes and the commoditisation of intellectual products within a global economic context, fail to conceptualise the kinds of protection necessary for, and indeed the interests involved in, community resources.

Thus, globalisation might be understood not as the development, operation, and maintenance of a truly globalised community, but as a familiar referencing of other

[99] See the site of the Commonwealth of Australia, Department of Foreign Affairs and Trade, "Intellectual Property as a Trade Issue," http://www.dfat.gov.au/ip/ip_trade_issue.html

[100] For instance, biotechnology based on traditional biological resources, whilst using a known natural product, might nevertheless amount to a patentable "use" or process. The fact of substantial financial investment in the collection of those resources has been considered relevant in finding rights in those uses (*Bristol-Myers Squibb Co v FH Faulding & Co Ltd* [2000] FCA 316 (22 March 2000), where the considerable money invested in research into the safe use of the drug was relevant, creating the necessity of protecting the "research" and "industry" in developing the methods of use and thereby the "property" in the method).

[101] Hoekman & Kostecki (2002): 274-280.

nations in a global relation to the increasingly westernised local, "the successful globalisation of a given localism":[102]

> The preponderance of trade and production remains concentrated within national borders and the "global" lying beyond these is revealed as an extension of national economies. The global market and so-called transnational corporations remain primally connected to national economies and overwhelmingly to a limited number of these, a number of which rarely strays or stays beyond North American, Japan and Europe.[103]

The operation of global economies, therefore, becomes readily recognisable for a typical and conventional exploitation of "uncivilised" tradition.

Free (to) Trade

> The image is associated with a place on Rirratjingu land called Yalangbara (which is at Port Bradshaw south of Yirrkala) and represents the events associated with the Djangkawu that took place there. My rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership … Aboriginal art allows our relationship with the land to be encoded, and ***whether the production of artworks is for sale or ceremony***, it is an assertion of the rights that are held in the land. The place, Yalangbara, and the particular story of the Djangkawu associated with it do not exist in isolation. They are part of a complex or "dreaming track" stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.
>
> Banduk Marika, Indigenous Australian artist[104]

It is important to understand that a rejection of the intellectual property model is not a rejection of the potential access to aspects of the commercial sphere where appropriate. Indeed, the potential to commercialise is necessarily part of genuine authority and capacity of communities with respect to resources.[105] Some Indigenous

[102] De Sousa (1995): 263.

[103] Fitzpatrick (2000): 4.

[104] Speaking about the painting, Djanda and the Sacred Water Hole, quoted in *Minding Culture* (2003): 11 (emphasis added).

[105] Therefore, in the model presented in Chapter 9, intellectual property law is understood as an important co-existent system, rather than attempting to rationalise traditional knowledge within that system. Instead, intellectual property laws remain relevant in certain circumstances where appropriate,

and traditional persons wish to benefit from commercialisation of their individual cultural products and expressions, and this should be possible according to the shared values of the community and through principles such as prior informed consent.[106] Similarly, the community as a whole may choose to license appropriate knowledge (where that disclosure will not be damaging to community)[107] and this should be an aspect of the community's authority with respect to its knowledge. The community-based model may indeed protect the way in which those intellectual property rights are exploited and the use to which the property of the "author" is put, through the critical principle of free and prior informed consent.[108] The application of customary management and consent would fulfil the call for the protection of those expressions so as to exclude non-Indigenous or non-traditional use where appropriate.[109]

In this way, while conventional intellectual property rights may persist, and indeed may be created on the part of the individual member of a community (where criteria of rights to that knowledge have been met), those rights may be made subject to the co-existing communal rights of the traditional community. Such communal rights may include the exclusion of non-Indigenous or non-traditional use in the market. Repercussions for individuals seeking to exercise rights in respect of knowledge that is found to be communal would include those from within the community, such as

but are necessarily rejected as the framework within which to construct the values and objectives of traditional knowledge protection.

[106] This model is presented fully in Chapter 9.

[107] This is considered more closely in Chapter 9, where consideration of potential harm to community or significance of the knowledge will be determined by aspects such as the sacred nature of the knowledge, the stability of the object, and the stability of the identity with respect to the dissemination of that object.

[108] This principle is revisited in Chapter 6 and developed more fully within the model presented in Chapter 9.

[109] WIPO/GRTKF/IC/4/3 (20 October 2002): 15.

exclusion and non-recognition. The impact of customary law should not be underestimated in this respect.[110]

This approach would be consistent with a country's international obligations under the various intellectual property treaties, which do not oblige an intellectual property holder to act contrary to other laws. For instance, in the context of copyright law and Article 17 of the Berne Convention, the IGC notes that "in the event that customary laws were to be recognized for this purpose by a country's laws, copyright does not entitle or oblige a traditional artist to act contrary to his or her customary responsibilities."[111]

Nevertheless, it may remain a controversial strategy within the context of international competition for resources. One of the most frequent public reactions to campaigns for land rights and control over traditional knowledge and genetic resources, is a "suspicion", as it were, that the community in question is motivated merely by commercial reasons.[112] As considered in Chapter 1, an attachment to the self-possession model of identity will be problematic in the context of sustaining community resources, as it would imply that the motivation for Indigenous protection of resources is a desire for material possession. In a western legal system where the individual is of primary normative significance, that desire is itself a form of protection by guaranteeing the individualism of the creator, the western legal person, and by guaranteeing thus, a source of identity and origination. It is for these reasons

[110] Ahren (2004).

[111] WIPO/GRTKF/IC/4/3 (20 October 2002): 23.

[112] See the discussion in Brown (2003): 37-39. Referring to this frequent charge against Indigenous and traditional claims to culture, Brown suggests that the difficulty of separating issues of commercialisation and economic gain from issues of cultural identity can be understood in terms of the way in which the dominant culture commodifies identity, through its valuing within a capitalist framework.

that both a property model and a conventional human rights model (considered later) present serious limitations when trying to protect communal resources. Rights and responsibilities imposed by the state upon individuals, as members of that state, must therefore co-exist with the collective and associational responsibilities that rely upon community relations.

If custodianship also facilitates the community's use of those resources for commercial reasons, it follows that this should not undermine that community's rights to its intellectual products. Commercial use should not denigrate the community, compromise its integrity, or preclude access to its rights because of a pre-conceived and imposed notion of the "traditional" community, based upon nostalgic and historical concepts of that use. The use of resources pursued by communities should not be externally regulated according to that which *authenticates* the community, to recall the earlier discussion. If that use is sanctioned by the community, that use is *a priori* traditional. The commercialisation of appropriate knowledge may comprise part of a community's collective strategy and cultural repertoire for ensuring its ongoing integrity and cohesion, and so within the concept of community based upon interrelationships and mutual recognition, that commercial use will be "traditional."[113] The fact of the perceived "problem" of a commercial motive and the all too frequent caution of "floodgates" with respect to rights over traditional knowledge, betrays the very commercial nature of the resources and the desire of private interests to exploit those resources. Surely Indigenous and traditional communities are entitled to control that use where necessary, or share in the benefits where exploitation goes ahead,

[113] In other words, where knowledge is used and produced in accordance with the responsibility to tradition and with the customary law of community, that use will necessarily be traditional. Evolution in expression and the development of knowledge therefore cannot undermine the traditional nature of that use.

rather than allow an essentially communal resource to be removed from the public realm (albeit in a limited sense, within a restricted community) to the private domain? If it is a competition of equities, that removal by outside interests simply cannot be sustained on the basis of the possible commercialisation by the community.

Therefore, through communal entitlement to practise tradition and custom through the management of resources, co-existing with individual rights in intellectual property, it may be possible to balance the reward of the individual with the achievement of effective protection for communal traditional knowledge and its exchange. Furthermore, this framework promotes the protection of traditional cultural resources otherwise totally outside the intellectual property system and goes some way towards overcoming the historical and sentimental rendering of the traditional community. It is this sentimental and fixed concept of community that facilitates the ongoing denial of community access to the contemporary public, political, and economic realm and, through that denial, legitimates the ongoing discrimination against community access to processes of commercialisation of its rightful resources.

In order to understand and anatomise the critical conflicts between international intellectual property standards and customary laws, the following chapter will consider particular examples where the grand narrative of intellectual property objectifies traditional knowledge and its development.

Chapter 3: Intellectual Property and Other Objects of Protection

> One of the greatest problems facing us in Africa is how to reap the benefits of industrialization without incurring the more unlovable of its apparent fallouts, such as the ethic of austere individualism.
>
> Kwasi Wiredu, African Philosopher[1]

Introduction

Earlier discussions noted the objective throughout the literature of the need to strike a balance between the protection of communal traditional knowledge and the private rights of intellectual property ownership. The rhetoric of balance, however, betrays a conceptual commonality with other areas in which Indigenous and traditional rights in resources are seen to compete with those always already in place, such as in competition over rights to land and access to finite biological resources. Culture is similarly composed as a kind of finite exclusive interest, which will intrude upon the private economic rights in inexhaustible intellectual property.

Drawing upon the discussion in the previous two chapters, it will be argued that by emphasising principles of ownership, property, and dominion over resources (set out as the means for the development of individual subjectivity in western society), attempts to create effective protection for traditional knowledge according to intellectual property models alone, will paradoxically deny individual members of communities the cultural means by which to develop their "personhood." That is, programmes of protection for traditional methods of expression, prohibition of the

[1] Quoted in Bell RH (2002): 63.

inappropriate reproduction of cultural symbols, and other examples, may provoke opposition and resistance[2] as unjustifiable interference with the ordinary individual's access to the cultural means for creativity and the "continual renewal" of culture, while at the same time denying the importance of other traditions of development.[3] Furthermore, such systems will diminish the importance of the relationship between community and resources, which this work argues throughout is the fundamental subject-matter of protection. Ultimately, it will not be through external regulation of the market and management of property, but through facilitating self-governance and development in ways compatible with a community's traditional values and fundamental practices with respect to resources, that the protection of traditional knowledge will be achieved within a programme of cultural diversity.

Beyond the interests of private property and the exercise of monopolies and exclusive rights that characterise the framework of intellectual property, cultural and intellectual activities present not only economic benefits to traditional and Indigenous groups, but also instrumental value to the preservation of culture and community, as considered in Chapter 1. The current chapter will draw upon this and the analysis of the intellectual property system in Chapter 2, to consider the ways in which conventional intellectual property regimes fail to address, protect, or facilitate ongoing cultural preservation. It will show that private property rights and monopolies are inadequate and problematic as the fundamental framework, and will develop further the argument for protection where customary law is instrumental rather than peripheral. This chapter and the

[2] Reactions to traditional knowledge protection as an unjustifiable restriction upon access to knowledge and censorship of expression, therefore, interfering with the citizen's right to freedom of expression, are explored in further detail in Chapter 5.

[3] See the critique of progress understood as a continual renewal, contrary to any understanding of development based upon a responsibility to tradition, thereby opposing tradition and innovation, in Negus & Pickering (2004): 99.

following chapters will trace the necessity of customary law to preserve intellectual interests through biological diversity and international (customary) obligations, towards the framework set out in the penultimate chapter.

The current discussion of the limitations of intellectual property principles will prepare for the following chapter, where the international framework for intellectual property standards is considered, including current activities in WIPO towards achieving international protection for traditional knowledge. In the context of these discussions, an examination of various national experiences with respect to traditional knowledge will be made, both in terms of attempts to protect traditional knowledge within intellectual property regimes, and with respect to *sui generis* sources of protection.

Despite the limitations of intellectual property models, these approaches continue to generate enthusiasm for an international framework, which must be considered. For that reason, the examples of the possibilities for intellectual property are examined in this chapter[4] in the context of the theoretical framework established in Chapter 2. The

[4] It is not possible, nor useful in this context, to document all examples and instances of the incompatibility of community resources and intellectual property, or to describe all examples where intellectual property has been successful to limited extents in protecting traditional knowledge. It is beyond the scope of this work, but this kind of comprehensive account is available in a number of invaluable sources. For instance, see *Minding Culture* (2003); Dutfield (2000); Posey & Dutfield (1996). Examples will be drawn upon to particularise certain aspects of the conflict, but are not to be understood as an exhaustive account of the application of intellectual property law to traditional knowledge. Further, the discussion will draw primarily upon Australian examples. Australia is chosen as a particularly useful study – as a developed country with strong intellectual property rights, and with a history of violent colonisation and assimilationist policies, including the White Australia policy, the Stolen Generation controversy, and a long battle over land rights, considered in Chapter 7. The Indigenous Australian communities are also considerably dispersed and evolved through the process of colonisation, whereby new distinct and indeed political communities have been developed with respect to particular political mobilities and conceptualisations. Such groups or identities, including Murri, Nyungah, and Koori groups, are imagined in relation to much larger regional areas of Australia, but not in substitution for original communities or tribal connections. These identities have resonances with geographical place, and yet elude fixation to place through this evolution of community beyond the historical "moment" of colonisation. This allows the development of this argument towards the discussion in Chapter 7, which extends this consideration of the Indigenous Australian in particular, with respect to land. It is hoped that, for the purposes of this work, by concentrating upon the

following chapters will extend the discussion of the complex relationship between international trade and intellectual property law, and other relevant and potential sources.

Intellectual subjectivity: "Origination" and "In-Imitativeness"

It seems clear from the previous chapter, and from the concept of community set out in Chapter 1, that conventional intellectual property regimes at best compromise the integrity of community resources, and at worst fail to realise fully the necessary value in Indigenous and traditional cultural material, in attempting to render traditional knowledge within systems which cannot account for the community interest in cultural resources.[5] To support the model of community resources, it is necessary to characterise the way in which traditional knowledge development is incompatible with intellectual property, not primarily because of the intellectual "work," but because of the process of production. In other words, the organising principles of origination and in-imitativeness introduced in the previous chapter are largely incompatible with community resources and the conceptualisation of the relationship of community to knowledge. Therefore, it is necessary to consider not how the system might account for the "objects" of traditional knowledge, but how the fundamental

Australian example the development of the argument concerning intellectual property, cultural knowledge, and the land as a further means of expression, is made clear.

[5] And indeed, this is well recognised throughout the literature. In particular, see the comprehensive WIPO report, *Minding Culture* (2003). Although discussed later, it is useful to note here that a major feature of proposals of the WIPO IGC for protection of traditional knowledge is that of mandatory documentation of traditional knowledge as a prerequisite for protection. This is set out in IGC documents from the Fourth Session, 9-17 December 2002, including the Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge, WIPO/GRTKF/IC/4/5 (20 October 2002) and in contributions to the Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources, WIPO/GRTKF/IC/4/14 (6 December 2002), and is expected form a major part of the forthcoming discussions of the Seventh Session, to be staged 1-5 November, 2004. The questionnaire circulated to participants is directly concerned with issues of recognition for traditional knowledge for the purposes of patent protection. WIPO/GRTKF/IC/Q.5 (July 2004).

relationship between community and knowledge might be legitimised within an international framework of protection.

Intrinsic to this relationship is the communal process of knowledge development, whether "creative" or "utilitarian," "folklore" or "traditional knowledge."[6] The dominant or western form of development that is encouraged and rewarded in conventional intellectual property systems (origination and in-imitativeness) is potentially at odds with incremental and traditional innovation, and the communal relationship with resources. It is necessary to demonstrate clearly the departure from information models in order to characterise the clear need for the principle of respect for community resources.

A significant example of the inappropriateness of the value distinctions of origination and in-imitativeness, in classifying knowledge, can be seen in the impact of intellectual property upon folklore and traditional cultural expressions. Art works, cultural dress, dance, song, and story, for instance, present particularly troubling cases of this incapacity of the present system to address the traditional relationship of community to knowledge and to expression.[7] Western preoccupations with expression as a freedom of the self (freedom of speech, freedom of expression) and as the means by which to make oneself recognised, are critical to the natural justice and economic justifications for intellectual property protection as personal property. However, this perspective is at odds with communal experiences of cultural expression.[8] As explained by Golvan: "The personal property nature of copyright has no real meaning

[6] See the discussion of the taxonomy of traditional knowledge in the Introduction.

[7] See the discussion of the Sámi joik in Chapter 1.

[8] See the extended discussion of "freedom" in Chapter 5.

for a good many Aboriginal people whose rights, it is hoped, can be protected."[9] Further, Janke states that intellectual property law "grants economic rights which are individual rights and freely assignable, whereas Indigenous peoples rights are collective in nature, being focussed on cultural rights that are often qualified in terms of transmission."[10] One of the persistent problems, therefore, for adequate protection within an intellectual property model is the inability of that model to account for community practices of sharing and transmitting knowledge, as distinct from the commodities in information derived from that knowledge.

This conflict is particularly acute in the example of Indigenous and traditional knowledge artwork. Traditional and Indigenous communities have seen a dramatic increase in the unauthorised reproduction of their art,[11] as well as the appropriation of the methods themselves.[12] As custodians, these communities have sought recognition of a right to prevent this re-presentation as decoration of what are their culturally significant resources of identity.[13] Under customary law, pre-existing traditional designs, for instance, must be recognised and protected against unauthorised reproduction and adaptation. Obligations and responsibilities are owed to knowledge that is not only identified as cultural artifacts (cultural dress, dance, art), but also embedded in identity and inextricable from territory (beliefs, medicinal knowledge,

[9] Golvan (1995b). See also the issues paper released by the Commonwealth of Australia, Attorney-General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (1994).

[10] Janke (1998): 9.

[11] Ellinson (1994); Blakeney (1995).

[12] For a comprehensive account of the appropriation of artistic method in Indigenous art, as an ongoing process of colonisation, see Thomas (1999): Chapter 4.

[13] This has included the call for separate legislation to protect indigenous intellectual property, acknowledging the very different value to Indigenous producers of that intellectual interest as well as the inadequacy of conventional legislative protection of intellectual property. See the ATSIC report, written by Terri Janke, *Our Culture Our Future* (1997), which recommends a *sui generis* legislative framework that draws upon customary laws to include and protect all forms of Indigenous cultural and intellectual property, including ecological and agricultural knowledge (Ch 18).

agricultural knowledge, ecological knowledge, and landscape). That is, customary law protects the traditional knowledge and ideas that subsist and continue in the reproduction of the knowledge of Indigenous and traditional communities.[14]

As earlier discussions have shown, efforts to achieve protection through the safeguarding of designs as emblems are inadequate,[15] presuming the fixity of their reproduction and an artificial circulation as object apart from the communities which they personify. Inherent in this approach is the persistent assumption that this is a purely emotional attachment to knowledge, without recognising full rights in the communities to manage the knowledge as appropriate, including licensing areas of knowledge according to shared values and consent.

The potential problems and incompatibilities between community resources and the organising principles in an intellectual property framework of origination, in-imitativeness, and the market, can be recognised. Intellectual property models locate and fix creativity in the independent "intellectual" work (work/invention), and rights in the individual (author/inventor), rather than the relationships between individuals that are intrinsic to production within the community model; relationships which resist this classification of knowledge broadly related to economic/commercial utility. This same process of classification is implied in the different durations of monopolies, the different limits upon monopolies, and so on, that operate in intellectual property systems, indicating efforts to mitigate the risk associated with the property while maintaining the market for its use. The "market" for the appropriate use of community

[14] Ellinson (1994): 331.

[15] Earlier discussions noted the way in which this form of protection denies communities the ability to act in respect of their knowledge as they wish, including commercialisation of that knowledge where appropriate. The example of the sacred sun symbol of the Zia Indians of New Mexico illustrates this conflict: Lopez (1999).

resources is, thus, unthinkable within an intellectual property framework, which summarises that use within an economy of exchange in information.[16] While creativity in the "intellectual" work is fixed (that is, its meaning is simplified according to the boundaries and lifetime of the work) and limited (according to the source of the creativity or invention), and indeed must "materialise" in order to be given legal effect (it must have a form that may be protected within intellectual property models), the community model undertakes relationships between communities and their resources in a process of belonging that necessarily resists fixation. It is important to examine in detail, therefore, the conflict that may be identified in relation to each of these key principles: origination, understood in terms of creatorship and ownership, and material form; in-imitativeness, comprised in the principles of originality, novelty, and inventiveness; and the market, as implied through the construction of periods of duration. What knowledge is therefore "legitimated" by intellectual property laws as civilised and cultural? What kind of "ownership" for communities is validated from this perspective?

1. Origination

1.1 Creating Owners

Intellectual property rights are based upon an identification of the individual source of the creation, whether the author of a copyright work, the inventor of a patentable invention, and so on. Intellectual property laws protect "expressions," actualisations, rather than mere ideas, and in doing so suggest a source for that actualisation: "The

[16] This is not the same as suggesting that community use may not include access to the market, indeed far from it. It is the application of an intellectual property framework to the specific interests in community resources that may paradoxically deny that access and construct community use of traditional knowledge according to sentimental and historicised notions of "the traditional."

primacy of the visual … not only tends to create a certain type of human identity or subjectivity but also tends to valorise the individual as writer/author/subject."[17]

In each of the various instances of recognition as intellectual property, the reward for the contribution to society through the intellectual property is the creation of limited rights in respect of that property.[18] Thus, the author or inventor is granted a certain level of control over the material according to commercial models of reward. The object of "protection" in the subsequent uses of that material is that identity of the individual, and the recognition of the individual – as produced through economic rights and financial return, and the access to possessory rights in, and control over, one's expression. This relationship between individual subjectivity and economic rights might be traced through to the increased emphasis upon rights in personality that has emerged in intellectual property law.[19] Furthermore, it explains the rhetoric of "ownership" that has been encouraged and deployed by intellectual property advocates,[20] despite the fact that intellectual property rights are not rights of absolute dominion over a finite resource, but are economic rights within an artificially sustained and regulated market. This "ownership" or "control" is thus conferred upon the individual in respect of the manifest expression (whether the copyright work, the invention, the design, and so on):

> The individual as author appears to control the medium of expression both politically through freedom of expression and economically through the legal discourse of copyright, creating material forms of expression, works, the

[17] Wright (2001): 127.

[18] Intellectual property, as a legitimate "grand narrative" signals that such information is a contribution to culture and society through the very fact of the rights created in that information.

[19] Landes & Posner (2003): 37-70. See also the discussion of personality rights in Beverley-Smith (2002). Similar to the way in which intellectual property law has been identified as defining Culture and creativity, the emergence of personality and indeed publicity rights suggests a kind of "branding" effect upon individual subjectivity.

[20] Pretorius recognises the emotive language of "theft" and "piracy" in Pretorius (2002): 183.

> world and ultimately him- or herself. We talk about individual citizens being the "authors of their own destiny." In addition the "written-about" becomes the object to be dissected and the "written-to" becomes the passive recipient of truth, or "the Truth."[21]

The "truth" of intellectual property as the grand narrative of innovation,[22] interpellates the means and process of knowledge production and community, such that community, as understood within this system, is vested with the same perspective upon knowledge as object, upon meaning, and upon dissemination. In this way, the "origin" acts to constrain the meaning of the work, to limit the proliferation of meaning beyond the boundaries of the work. Similarly, the community is constrained and individualised as a collective self. That is, intellectual property compartmentalises knowledge as commodifiable information and the creative process as a singular and simplified event, producing "the illusion of singularity and therefore of universality."[23] The "ownership," if it is to be understood in this way,[24] is therefore granted over information. Knowledge, on the other hand, cannot be owned or limited in this way. Indeed, building upon the previous chapter, the Idea/Expression dichotomy becomes the Knowledge/Information dichotomy in the current international debate over traditional knowledge protection.[25]

This construction of creativity can undermine the often different relationships to creativity sustained in traditional and Indigenous groups:

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[21] Wright (2001): 130.

[22] Chapter 2

[23] Wright (2001): 130; Leach (2003). See the idea of the grand narrative in Chapter 2, and the importance of universality and objectivity to the maintenance of intellectual property as commonsensical and rational.

[24] This is not to suggest rights of ownership or absolute dominion, but intellectual property as accompanied by the rhetoric of ownership.

[25] Note the different language of Indigenous and traditional groups (knowledge, identity) versus private international law language of intellectual property advocates.

> [I]t is essential to understand the essentially distorting nature of property itself as a form of ownership … Among other things, the concept of intellectual property sustains assumptions about the individual author, and exclusive access. An understanding of the nature and specific form that creativity and value generation take in particular circumstances is essential if regulatory regimes based on these two aspects are not to undermine the very forms of sociality which result in "cultural productions."[26]

For traditional and Indigenous groups, the "reward" of creativity may also be embodied in the ongoing cohesion and integrity of communal and kinship patterns, rather than what may be described as the making of that creativity into objects over which control may be exercised as a reward.[27] In other words, conventional commercial interpretations of reward, including systems of benefit-sharing and access,[28] may obliterate the fundamental object of protection.

As a result of this basic disjunction between community resources and intellectual property, responses to the protection of traditional knowledge have looked to adequate attribution rather than restriction of use.[29] However, identification of the community in accordance with intellectual property models (and the western model of individual subjectivity) does not necessarily provide rewards that are appropriate/relevant/adequate in the context of traditional knowledge development and community integrity. Worse, the identification of community through such use may achieve little more than the stereotyping of individual communities as a generalised collective source of "tradition." The concern here is that such identification continues to depend upon a simplification of the creative process, and a

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[26] Leach (2003): 1.

[27] Leach (2003): 1

[28] See the discussion in Chapter 6 as well as the recent criticism of benefit-sharing by Sharma D (2004).

[29] Defensive approaches to protection will be examined in more detail in Chapter 4, where the WIPO IGC discussions are considered, but, as discussed, they include an emphasis upon the documentation of traditional knowledge, disclosure of origin, and the "branding" of authenticity through certification marks and comparable mechanisms.

simple demarcation between the creator and the product, contrary to the way creativity may be imagined in traditional and Indigenous groups. For instance, Indigenous Australian production does not suggest this artificial separation:

> While there is an economic imperative to the present day production of art and craft, each finished piece represents the integration of the cultural, spiritual and social elements of the artist's life. The richness and diversity of the Aboriginal art and craft industry in Central Australia also reflects the integration of unique skills and technology of an ancient culture and the immense artistic and creative adaptability of Aboriginal people.[30]

Indeed, in being used non-traditionally, disclosure of the origins of traditional knowledge may not be adequate. Furthermore, this approach purports to identify the nature of what is being sampled (through attribution), but the transformation of knowledge in its unauthorised use is not necessarily countered by this attribution.[31] Arguably, the "originality" of the community resource is lost in the translation.

In contrast to the principles of conventional intellectual property law, it is not the self or identity of the author or inventor that is necessarily critical to the resilience of Indigenous and traditional resources and expression. For instance, Australian Indigenous groups frequently identify their community or tribal origin through their works, rather than the celebrity of the creator.[32] Therefore any personality of the artist or inventor, as it were, is indicated by, and indicative of, that of the "community" as it might figure within a legal paradigm for the purposes of protecting community resources. Importantly, the concept of community established in Chapter 1 challenges the normative individualism of western legal paradigms, and the conventional

[30] Patricia D'Aranjo, Desart Inc, Aboriginal art and craft centres of Central Australia. Desart 1993, quoted in *Minding Culture* (2003): 121.

[31] This same transformation may occur through the preservation of knowledge. For instance, objects removed may lose their spiritual power and literally become a museum artifact: Simpson MD (2001): 198. This is in addition to the possible wider transformation through the removal of knowledge comprised in that object, and through its display.

[32] Golvan (1992b): 5.

opposition between the individual subject and the broader society, suggesting that the individual cannot be separated from community, but that community (as distinct from competitive and ambitious individual possession of self-expression) is always already present in the production of individual subjectivity.[33]

What is becoming clear here is the inappropriate application of western notions of information and ideas as inexhaustible, non-rivalrous, and non-crowdable, to traditional knowledge which is embodied, corporeal, finite, and exhaustible (through cultural transformation and inappropriate use) – that is, inimitable. As shown in the analysis of community and apparent throughout the model developed here, the objects of knowledge are not independent from the creators in community resources. Therefore, non-traditional and/or inappropriate use of traditional cultural expressions and knowledge fractures that relationship, and transforms the value of the knowledge (through mis-identification of self and community).[34] In particular, the conflict between traditional knowledge and western conceptions of information becomes acute in the context of arguments against *sui generis* protection, based on notions of freedoms of speech and expression,[35] which presume this independence in order to justify the individualistic rhetoric of these "freedoms." These arguments mark a critical turn in the emphasis upon the individual creator in intellectual property discourse.[36]

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[33] Guattari (1995b): 207. This shares much with many Indigenous and traditional philosophies, including Akan philosophy which suggests that an individual attains personhood because of community, never without it. See the discussion in Bell RH (2002). See also Guattari (1995a).

[34] For a discussion of this relationship between identity and knowledge, see Martin (1995). This process of appropriation of identity through the inappropriation reproduction of cultural symbols is also considered in Loftus (2000) as a process of ongoing colonisation.

[35] See for instance Brown (1998): 199.

[36] The notion of freedom is revisited in Chapter 5 in the context of the principle of freedom in "open source" and "open access" models.

Justifications of the sampling of traditional cultural expressions, based on the freedom of expression, make several assumptions. The most fundamental of these is the ongoing attachment to possessory models of self-hood, considered in the previous chapters. The application of unfettered freedom to use and adapt cultural knowledge in the process of expressing one's self, assumes that these are rights that, in their application, may be enjoyed equally by all. But indeed, to do so is to transform the means of communication, compromise the access to that communication, and ultimately deny the community its freedom of self-expression. If freedom of expression includes access to the means of communication, then arguably the appropriation of symbols, designs, expressions, and other resources, threatens the access by communities to those means, through the transformation and denigration of cultural value in those symbols through inappropriate and irrelevant use.

Second, arguments based upon freedom of expression depend upon a summarisation of traditional knowledge as information to be consumed and transformed. Indigenous and traditional groups might argue that the kind of protection sought cannot be interpreted as a restriction upon the freedom of expression (or indeed free speech), but as a necessary protection of a finite cultural resource against its commodification and potential exhaustion within a free market economy of ideas.[37] As set out in the previous chapters, traditional knowledge protection is one aspect of community resources, which builds upon respect for cultural diversity. Therefore, the concept of community resources (and protection of traditional knowledge) encompasses specific protection of cultural diversity against the uniformity of the means of expression that

[37] Fourmile (1999): 235-37. See also King & Eyzaguirre (1999): 42.

would arguably arise through unfettered economic approaches to information.[38] In particular, if access to protection is linked to (and possibly governed by) the commercial potential of traditional knowledge alone, then those resources outside this criterion are at risk of being lost or overlooked: "A great deal of traditional knowledge has no commercial potential whatsoever, but this does not make it any less worthy of respect or protection."[39]

Third, freedom of speech/expression arguments construct "community" or "traditional knowledge" as a kind of movement in and of itself (like surrealism). For example, one can paint in the surrealist tradition and insert oneself into the community of "surrealism."[40] Surrealism persists because of the expressions (the art work, the literature), as a product. Despite its political history, surrealism is sustained as a topic for art history and as a "brand" through the artistic products. The commonality that sustains "Surrealism" is the expression, the feature in common. It is not the community that paints.

On the other hand, particular forms of traditional cultural expressions are not movements in and of themselves. Rather, they emanate from the community to describe and cohere community, rehearsing that particular community's relationship to land, nature, and spirit. Community does not necessarily arise out of choices to produce in that way, but rather, is the basis for the belonging expressed through the knowledge. Therefore, as a result, individuals appropriating methods of painting and expression do not identify themselves with a "movement," with that collective of

[38] This is not to suggest that cultures and traditions are not resilient, and are merely homogenised by the effects of globalisation, but to acknowledge explicitly the impact upon cultures of the loss of access to their knowledge through its cultural and political transformation as a result of misappropriation and ultimate expropriation (physical and otherwise). See Jones DJ (2000): 46.

[39] Dutfield (2000): 37.

[40] See the discussion of material form below.

artistic expression, as though painting "in the tradition of" that style of painting. For example, "surrealist" objects realise an independence and currency despite the community, not because of it. For traditional knowledge, on the other hand, appropriation of expressions impersonates not the style, but the community. It is a "theft" not of the object but of the identity.

With these aspects in mind, to argue for access from the point of view of freedom of expression or freedom of speech, is to disregard the attending "duties" that qualify those freedoms,[41] to impersonate the community, and to ignore the "exhaustion" of Indigenous and traditional knowledge that may occur in the process of "the imperial refusal to accept limits on either intellectual or physical space."[42]

1.2 Owning creation

> A human being cannot own its own mother. Humankind is part of Mother Nature, we have created nothing and so we can in no way claim to be owners of what does not belong to us. But time and again, western legal property regimes have been imposed on us, contradicting our own cosmologies and values.
>
> Indigenous Peoples' Statement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the WTO Agreement[43]

Most Indigenous and traditional communities are concerned with pre-existing tradition and its resilience for contemporary communities, for next generations, and for urbanised Indigenous and traditional peoples. In the context of copyright, for example, many works are of great antiquity and questions of origin, other than that of the community and tradition itself, may be difficult to answer. Furthermore, the

[41] The concept of freedom, particularly when applied in "freedom of expression," is explored in more detail in Chapter 5.

[42] Marcus (1996): 41.

[43] See the Indigenous Peoples' Statement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the WTO, NO To Patenting of Life! (1999). This statement was signed at the United Nations, Geneva, Switzerland, on 25 July 1999 by over 80 signatories representing many Indigenous Peoples' organisations, non-governmental organisations (NGOs) and networks.

complexities of custodianship and communalism explored in Chapter 1 make clear that "ownership" of traditional knowledge is not unitary or discrete as it is under the intellectual property model, but is disseminated among groups and between and beyond individuals.[44] This raises the difficulty of identifying those authorised to give permission for the use of Indigenous and traditional knowledge, a problem which has also been noted as an obstacle to the negotiation of fair and equitable compensation for that use.[45] Significantly with respect to the question of folklore, the 1982 UNESCO-WIPO Model Provisions recognise the possibility of communal rights and make no reference to authors or ownership throughout the *sui generis* system presented.[46] Yet "community" remains beyond the reach of conventional intellectual property models of ownership and moral rights.[47]

Despite the provision for collective creation in intellectual property laws (such as joint authorship or joint inventorship), this framework is also inadequate to facilitate communal management of traditional resources. For example, joint authorship does not extend the notion of authorship in any relevant way with respect to communal title.[48] Concerns raised by Indigenous artists, for instance, include the appropriation of

[44] For discussions of the impact of communalism in copyright law, see Ellinson (1994): 335. See also Vann (2000): "More traditional or less Westernised artists face further problems. It is sometimes difficult to identify the artist as the author of the work for copyright purposes. The practice of signing a painting is another Western idea, and identification problems are magnified when the artist is no longer living" (15).

[45] Bell R (1985b): 8-9.

[46] Note discussion in WIPO/GRTKF/IC/4/3 (20 October 2002): 21.

[47] See the concern expressed by Golvan (1992c), where he argues for recognition of tribal ownership of art, drawing upon principles of equity: "tribal owners may, under principles of equity, protect their interests in the designs for which they are the custodial owners" (15). He argues for the importance of respect for the dignity of Indigenous Australians, and from this calls for incorporation of customary systems of ownership and management of art: (17).

[48] Vaver suggests "An apparent reluctance on the part of some courts to admit joint authorship may spring partly from the romantic view of the author as Lone Genius, or from a more pragmatic desire to avoid problems that plague co-ownership generally": Vaver (2000): 76.

artistic method by non-Indigenous or non-traditional authors.[49] Furthermore, the part owners of intellectual property take not as joint tenants, but as tenants in common, meaning that any one of those owners may assign their rights outside the community or maintain an infringement action against another without joining the co-owners,[50] thus defeating any custodial role of the community.[51]

A further and related example of the inappropriate application of the private ownership rights of intellectual property to community resources is the enforcement of those rights. The private ownership that is the normative principle of intellectual property rights often necessitates the enforcement of those rights in order to realise the intellectual property therein. Thus, the "form" of intellectual property takes effect, as it were, through the expensive litigation of those rights, as in the example of pharmaceutical patents (of immediate relevance in the context of traditional medicinal knowledge). The rights of invention are useless unless the commercial resources are there to enforce them..

Furthermore, difficulty in identifying or finding a right-holder may result in harm to an Indigenous or traditional group because of the inability, on the part of the

[49] For example, while the supply of an artistic idea may amount to a significant contribution, it will not amount to joint authorship with the artist under the Australian Copyright Act 1968 (Cth): *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99; *Bartos v Scott* (1993) 26 IPR 27 at 30 per Young J; *Brumar Contractors v Mt Gambier Garden Cemetery Trust* (1999) 47 IPR 321 per Martin J.

[50] *Lauri v Renad* [1892] 3 Ch 402; *Powell v Head* (1879) 12 Ch D 686; *Cecinsky v George Routledge & Sons Ltd* [1916] 2 KB 325; *Prior v Lansdowne Press Pty Ltd* [1977] VR 65; (1975) 12 ALR 685; *Acorn Computers Ltd v MCS Microcomputers Systems Pty Ltd* (1984) 4 IPR 214 (Fed C of A); *Dixon Projects Pty Ltd v Masterton Homes Pty Ltd* (1996) 36 IPR 136; *Milwell Pty Ltd v Olympic Amusements Pty Ltd* (1999) 43 IPR 32 (FCAFC); *Prior v Sheldon* (2000) 48 IPR 301.

[51] Nevertheless, equitable principles may apply where a copyright owner may become bound through an oral or implied agreement to hold the copyright upon trust for the other parties jointly: *Robert J Zupanovich Pty Ltd v B & N Beale Nominees Pty Ltd* (1995) 32 IPR 339. For a discussion of the application of equitable principles in order to achieve protection for Indigenous Australian traditional knowledge in cultural expressions, see Gibson (2001); Vann (2000); Kenyon (1999); Kelly P (1999).

community, to protect traditional knowledge in any permanent sense.[52] Such difficulty was addressed by the Federal Court of Australia in *Foster v Mountford*[53] with respect to the recognition of tribal ownership of confidential ideas. Connection with the subject matter was established by connection with the group, recognising that cultural identity is in a relationship of mutual validation with the cultural knowledge and practices:

> The plaintiffs are members of an unincorporated body known as the Pitjantjara Council. As I understand the position, all members of the council are joined as plaintiffs, and they claim to represent all those aboriginal people who inhabit what may loosely be described as those lands where aboriginal people, including the Pitjantjaras traditionally lived and roamed, and who are now identifiable as a people who use the Pitjantjara tongue, although, as a matter of history, more than one tribal group may be involved.[54]

Similarly, artwork is not merely a distinct or recreational body, but an important encoding of customary law and knowledge.[55] The judgment in *Foster* represents an early indication of the increasing relevance of customary law to the application of the common law to Indigenous society, which culminated in the decision of the High Court in *Mabo v State of Queensland (No 2)*.[56] Nevertheless, before *Mabo*, the High Court of Australia resolved the question of standing by allowing representatives of tribes to bring proceedings to protect Aboriginal relics in *Onus v Alcoa of Australia Ltd*.[57]

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[52] Golvan (1992a): 231.

[53] (1976) 29 FLR 233.

[54] (1976) 29 FLR 233 at 234 per Muirhead J.

[55] *Milpirrurru v Indofurn Pty Ltd* (1995) AIPC ¶91-116 at 39,057 per von Doussa J.

[56] (1992) 175 CLR 1.

[57] (1981) 149 CLR 27.

An interesting example of the communal approach to ownership is given by the copyright case brought by Mr Bulun Bulun in 1989,[58] where the out of court settlement was shared equally between the artists despite unequal cases of infringement. The distribution of damages in this decision reflects a traditional conception of ownership as vesting not in the individual but as subsisting in the entire group: "It was explained by some of the artists that they felt they had suffered equally because each of them had had a design which had been reproduced without permission."[59]

Nevertheless, these examples are weak and inadequate approximations of communal ownership and rights; they interpret traditional knowledge as information commodities, they do not fully imagine customary management of knowledge, and they translate development practices in order to coincide with intellectual property criteria.

1.3 Material Form

Of particular concern regarding the relationship between intellectual property protection and traditional knowledge, is the emphasis on the material form in intellectual property law; that is, a form upon which litigation may be based in order to enforce, protect, and therefore realise that form, through the protection and affirmation of the property rights vested in the individual "creator." Further, the presumption is a completion and conclusion of that form, a delimitation of the work, the origination of the object of value. For example, conventional copyright protection

[58] *Bulun Bulun v Nejlam Pty Ltd*, unreported, Federal Court of Australia, 1989. Mr Bulun Bulun is an Indigenous artist who, in 1989, brought an action for infringement of copyright and breaches of the Trade Practices Act 1974 (Cth) in the Federal Court of Darwin, arising from unauthorised reproductions of traditional artwork on T-shirts, which subsequently settled but which provides significant information in the preparatory documents.

[59] Golvan (1992a): 228.

depends upon the manifest expression, the material form[60] and does not protect the idea. In contrast to this approach, traditional Indigenous cultural interests inhere also in oral histories,[61] dance, body painting,[62] and methodologies,[63] indeed the "ideas" that continue to inform their culture and to produce the "material" expressions of those cultures.[64] Artistic techniques are not simply an indication of an individual's method, as might be understood in the western application, but are an expression of an individual's tribal identity and of the continuity of tribal origins.[65] Thus, fixing traditional knowledge as information for the purposes of intellectual property protection is an inappropriate perception of that knowledge and summarisation of its meaning: "Traditional knowledge is dynamic, not static and cannot simply be documented and "fixed in a tangible form" to meet intellectual property law requirements."[66]

The inadequacy of current means of protection with respect to the integrity of tribal custom is illustrated by the reaction to successful claims of infringement, involving the "plagiarism" of Indigenous art through the creation of tourist versions or

[60] Copyright Act 1968 (Cth), section 10(1).

[61] Note the discussion of the sometimes problematic protection of speech and oral histories under UK Copyright law in MacQueen (forthcoming). In this paper MacQueen notes that despite the potential for copyright protection of speech there nevertheless "must be enough content to form an original work, and the words must also be recorded or fixed in some material form before any copyright will come into existence" (2-3).

[62] Ellinson (1994): 333.

[63] See *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1995) AIPC ¶91-116 (von Doussa J), on the subject of a cultural interest in painting techniques that warrants protection. In this case, evidence was also tendered that inaccurate reproductions cause deep offence as artworks are an important means of recording stories and culture and continuing that culture, causing the right to create such artworks and to use pre-existing designs and totems to reside in the traditional custodians of the stories who act as a fiduciary to the greater indigenous community.

[64] Ellinson (1994): 334.

[65] Golvan (1992a): 227.

[66] IPCB (2004b).

"caricatures of Aboriginal art" to meet the tourist market.[67] In affidavit evidence in pursuit of an interlocutory injunction in Bulun Bulun's litigation,[68] Margaret West, curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Sciences, explained the significance and importance of the protection of the pre-existing design or idea as distinct from the creation of a material form:

> There is no separate class of artists as such in Aboriginal society. Rather, all adults are expected to participate in the process of remembering and recording the dreaming rituals of their tribe … [T]he creation of a painting is regarded as an act in itself which conjures the spirit power of a tribe. The paintings are also used to educate members of a tribe in the tribe's rituals and dreaming, and may be studied by younger tribe members, under the supervision of an artist, in order that the rituals of the tribe are properly imparted … When an artwork is sold, it is never considered that the title to the design has passed. This always remains with the artist who is permitted by his tribe to depict the design in question. It is an unspoken understanding, on the part of the artists, that the purchasers will properly look after the artworks.[69]

In this respect, a more appropriate understanding of the traditional Indigenous perspective of the resources in that heritage dispenses with the idea/expression dichotomy of copyright[70] (that is, the idea/material form dichotomy) and acknowledges a community right in the practice and continuation of sacred designs that is greater than a mere artistic practice, and far more than property in an expression. Community identity, dignity, and integrity are therefore expressed and sustained through the very practice and subsistence of the Indigenous and traditional cultures:

> Sacred Aboriginal designs are not "ideas" in the same sense as, say, Cubism or Dadaism. Rather they are "property" in its most basic sense, the distinction between real and intellectual property having no significance in Aboriginal

[67] Golvan (1992a): 229.

[68] See also the case note by Golvan (1989): 346.

[69] Cited in Golvan (1992c): 348.

[70] *Hollinrake v Truswell* [1894] 3 Ch 420 at 427; *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 498.

> Customary law. It is thus a property right, not just a mere idea, which is infringed when a sacred design is employed in an unauthorised way: an infringement as concrete as trespass in Anglo-Australian law.[71]

The identification of community as an artistic "movement," as it were, is of particular concern when confronting arguments of freedoms (of access, of expression, of speech) against the exclusion sought by and necessary to communities. In other words, artistic "movements" may suggest the freedom of expression and the "death of the author"[72] However, this separation of the ideas as "movements" from the creators as community depends upon the prior recognition of an identifiable "work," while at the same time denying its reliance on the celebrity that actually occurs and persists through the spectres of Duchamp, Picasso, and Cézanne, in the process of cultural consumption. Indeed, these figures not only persist but arguably are necessary to the recognition of the collective of culture in these adaptations, the embodiment of these adaptations as a cultural movement in and of themselves, in order to make sense of these adaptations and their place in the cultural hierarchy.

What is important, therefore, is the way in which adaptation of Indigenous and traditional knowledge may suggest a similar "impersonation" of culture to the detriment of community identities. The "space" of Indigenous and traditional community is at risk of trespass by a non-Indigenous or non-traditional[73] work itself, where artistic method, spiritual beliefs, and traditional custom (which importantly, are not necessarily separable from each other for the purposes of regulatory taxonomies)

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[71] Gray S (1991): 15.

[72] Barthes (1977): 142-148. In the famous essay, "The Death of the Author," Roland Barthes critiques traditional readings of texts which seek to ascertain authorial intention, and argues for an understanding of the pre-existence of language which cannot be possessed and bound by interpretation.

[73] The use of the term "non-traditional" signals production that is contrary to the shared values and customs of a community, and is not to imply "tradition" as in historicity.

may be re-presented as "traditional" in the form of that particular "non-traditional" work.

1.4 Inimitability of community resources

This discussion returns to the notion of exhaustion of traditional knowledge, the problem of its "inimitability" and the need to protect it as a finite resource. The objectives of this protection are potentially inconceivable within intellectual property paradigms:

> Through the use of ancestrally inherited designs, artists assert their identity, and their rights and responsibilities. They also define the relationships between individuals and groups, and affirm their connections to the land and the Dreaming.[74]

Thus, the adaptation of designs, perfectly valid under intellectual property laws, is incoherent and destructive to the particular community whose identity may indeed be at stake.[75] The subject matter of protection is conceived in fundamentally different ways. While intellectual property, generally speaking, asserts the identity of the individual through attribution, publication, and display, traditional knowledge must be protected through differentiation according to the laws and rights of identity asserted within the community, rather than as a mere object of information for dissemination and exchange. The importance of "inimitability" is seemingly overwhelmed by the second organising principle of intellectual property frameworks, that of "in-imitativeness."

2. In-imitativeness

As well as posing a problem for ownership, "tradition" and the traditional development of knowledge raises particular problems for the criteria of originality,

[74] Artist Wally Caruana quoted in *Minding Culture* (2003): 75.

[75] The question of identity is emphasised throughout the WIPO Report, *Minding Culture* (2003).

novelty, and inventiveness. That is, works in intellectual property are characterised by their singularity, valued for their authenticity and genuineness – their in-imitativeness. Originality in copyright, novelty and inventiveness for the purposes of patentability, and so on, are arguably unsuitable and artificial criteria to impose upon traditional knowledge in order to make it assimilable within intellectual property law. Furthermore, these criteria contribute to the impact described earlier, of simplifying the creative process in order to facilitate the priority of the object in this system for the purposes of ownership regimes to apply.[76]

A concern under conventional copyright law, for instance, is raised by those persons making adaptations of Indigenous artworks for commercial use. For instance, under the Australian Copyright Act 1968 (Cth), non-traditional and non-Indigenous artists may be entitled to copyright if it is found that they have not copied a substantial part of the original work.[77] While this mechanism by which to determine the integrity of a work ensures that the subsequent works of individual Indigenous artists, in adapting pre-existing designs, will be subject to copyright,[78] it raises serious problems with

[76] Leach (2003): 2.

[77] Copyright Act 1968 (Cth), section 14. Dean Ellinson (1994) identifies the requirement of substantiality to be a particular obstacle to the protection of indigenous cultural property, and many otherwise offensive reproductions not, under the Copyright Act, infringements of indigenous intellectual property rights: "For a reproduction to constitute copyright infringement, a "substantial part" of the copyright work has to be reproduced. The originality of the part taken is a relevant consideration in determining whether a "substantial part" of the work has been reproduced. Where the part of an artistic work which is taken involves little originality on the part of the artist (which would usually be the case where it is the underlying pre-existing design which is reproduced) it may not be regarded as a substantial part of the artistic work even though quantitatively it may form quite a large part of it" (333). See also Stephen Gray's discussion in Gray S (1991): 11.

[78] The case of *Hatton v Keane* (1859) 7 CB 268 concerned an adaptation of a Shakespearean play, the court holding that the production as a whole was a proper subject of copyright protection despite the original play having entered the public domain. A significant issue in finding copyright in such adaptations is the evidence of sufficient skill and labour in the adaptation (see also *Robertson v Lewis* [1976] RPC 169 which involved the adaptation of a traditional musical air).

respect to appropriation of Indigenous techniques, themes, or ideas.[79] Not only does the opportunity for adaptation and subsequent copyright render that protection "wholly unsatisfactory"[80] to traditional owners, but also it greatly offends and interferes with the value and continuation of the culture to which that artwork belongs, potentially "exhausting" the value in the traditional knowledge in ways unimagined in western conceptions of the intellectual expression.

> The Ancestral Beings, their travels and experiences (known as Ancestral Events), the things they created, and the places associated with them, form the subject matter of traditional Aboriginal art. Of fundamental significance are the pre-existing designs which are the artistic manifestations of one or more of an Ancestral Being, Ancestral Event, or area of country associated with such Being or Event. The forms of the pre-existing designs are believed to have been created in the Ancestral Past by the Ancestral Beings, and they have been handed down through the generations ... According to traditional Aboriginal customary law, pre-existing designs cannot, and should not, be changed. Their efficacy, in the form of activating Ancestral power, would be impaired if they deviated too widely from socially accepted norms.[81]

Therefore, while originality is a requirement of copyright, traditional customary practice of Indigenous Australians foregrounds the continuation and adaptation of ancestral and cultural heritage. More generally, in-imitativeness, as a conceptual principle of intellectual property value and protection, is in potential conflict with the

[79] For instance, in *Bulurru Australia v Oliver* [2000] NSWSC 580 (28 June 2000), even though the court accepted that the Bulurru artworks were derivative and reflected Mr Oliver's ideas, concepts and many of his techniques, the court looked to the resultant material form and decided on the issue of substantiality that the artwork was substantially different and therefore did not breach copyright. Compare the earlier case of *Milpurrurru v Indofurn Pty Ltd* (1995) AIPC ¶92-116 at 39,069 per Von Doussa J, where a small area of copying, whilst quantitatively insubstantial, was held to be qualitatively substantial because of the cultural specificity and striking nature of the copied pattern, and therefore an infringement of copyright: "Although as a proportion either of the total artwork, or the total carpet, the area of copied material in comparison with the whole is not great, in a qualitative sense the copying is substantial." This will be relevant in the interaction between community resources and intellectual property considered in Chapter 9.

[80] Robin Bell makes the observation that it would be "wholly unsatisfactory that copyright protection might be given to a person who merely adapted a traditional work by printing it, for example, upon tea-towels. To give such free access by non-Aboriginals to the body of folklore which was traditionally given only to certain people for certain purposes might be to abuse the rich heritage and might perhaps destroy it. Aboriginals would lose any power to protect it": Bell R (1985b): 8.

[81] Ellinson (1994): 330.

stability of tradition for which communities are responsible and in respect of which expression and knowledge persist and evolve. For the model of community resources, this continuation may be understood in terms of the responsibility to tradition, from which the legitimacy for this system is derived on a more general basis.

Related to this western understanding of originality is the persistence of the attachment to "tradition" and to the "quaint" value of traditional and Indigenous works. It is relevant here to consider the case of Indigenous Australian artist, Leah King-Smith, whose work appropriates the ethnographic images in early colonial photographs of the exotic Aboriginal other, and re-presents those images using techniques of cibachrome and re-photography. In this way, King-Smith challenges the immediacy and objectivity presumed by this early anthropological arrest of the "ethnographic present"[82] and the way in which the subject was confined to a particular geo-historical moment in colonisation. This work was controversially rejected by the art committee of the Cologne Art Fair, as lacking authenticity:

> King-Smith's galleries was informed by the Cologne art committee that her cibachrome photographs were not considered as 'authentic Aboriginal art … but contemporary art … following in this tradition.' She was also reminded that 'folk art was not permitted at Art Cologne.' These contradictory remarks did not clarify why King-Smith's work was rejected. Was it because that [sic] she was 'Aboriginal' that she was only meant to make 'folk art'? Therefore when her work engaged with the media and forms of contemporary art she could only be judged as a fake. After an outcry in the Australian and German art world this judgment was reversed. Once the question of 'fairness' of representation was resolved it seems that the debate over this racist 'slip' did not extend to a consideration over the validity of the very criteria for authenticity and contemporaneity implied by this judgment.[83]

These events are a key example of the tension between the frozen "traditional" or geographical historical moment and the "unoriginality" and subsequent devaluation of

[82] Clifford (2003): 9.

[83] Papastergiadis (1998): 90.

contemporary interpretations of one's own culture. Imitation cannot be creative, creativity cannot be traditional.

Furthermore, this case demonstrates the limitations of a system that values the object of protection according to these broad notions of origination and in-imitativeness, in that such a system cannot recognise value in the process of transmission by tradition, of belonging. The "value," in the principle of community resources, is derived from, and constitutive of, the community. This is distinct from the emphasis in intellectual property models on the individual personality of intellect, or upon innovation that travels demonstrably beyond that which has passed before.[84]

In her transmission and continuation of community knowledge and her self-recognition and mutual recognition through that process, King-Smith rendered her work "un-intellectual," as it were, in that it did not persist as an individualistic self-conscious innovation upon or derivation from what had gone before. However, in expressing tradition in contemporary ways, she was also inauthentic. Instead, the work was effectively rendered mere imitation by the Cologne art committee, in their complete ignorance and defiance of the mutual or circular relationship between individual definition and community integrity. Thus, the creations of King-Smith could not be reconciled as art according to the strictly linear progress that attends western legal notions of originality and intellectual creation. Indeed, requirements of originality and invention logically undermine the non-linear differentiation and customary and cultural dissemination within Indigenous community groups.[85]

[84] See further the discussion of the criterion of originality and the simplification of the creative source (as inventor, as author) in the following chapter.

[85] See also the discussion in Papastergiadis (1998): 90.

3. Duration and the Market

Intellectual property rights are of limited duration, as statutorily defined in accordance with minimum standards set out in TRIPS, after the expiration of which the works enter the public domain. As discussed, the application of finite periods of protection is related to "calculations" of the time necessary to ensure a market for the information and a return to the producer, eventually delivering the information to the public domain for the benefit of society.

In contrast, Indigenous and traditional interests in medicinal and agricultural knowledge, cultural expressions, stories, dance, and so on, are integral to continuing Indigenous and traditional cultures. That significance and relationship to the community exists in perpetuity.[86] Therefore, the notion of rendering that culture part of the public domain can often undermine the value of that culture to Indigenous and traditional groups: "mythological events are not simply located in the distant past but are also in some sense seen to be part of a continuous present."[87] Thus, conventional concepts of duration are problematic and severely limit the efficacy of protection for Indigenous and traditional resources as intellectual property.

The concept of "duration" is meaningful as a commercial criterion, as suggested. It is the commercial life of an object, the time within which the "author" may expect to get a return. Again, this objective is not necessarily indicative of the value of the subject matter of community resources. While communities should retain the right to commercialise material where that is desired, the subject matter of community

[86] This is not to suggest that the quality or value of a particular cultural expression or traditional knowledge may change in value to the community; that is, expression of (stable) tradition may indeed evolve traditionally (as explained earlier in this work). However, the responsibility and authority with respect to the relationship between knowledge and community identity vests with community, in the model of community resources, rather than external applications of economic analyses of duration, as in intellectual property laws.

[87] Morphy (1991): 45.

resources is the right for communities to choose the way in which the material is managed. Thus, the entitlement of material to be included, the resourceability, as it were, would be up to the community's systems of customary law.

As explained, within intellectual property laws duration presupposes the importance of the information as a good to be traded. The desire for information to be shared is a precondition for its value, approximated in the periods of monopoly created for the various categories of intellectual property. The desire for information is a presumption for its protection by the system, through the creation of artificial scarcity and market value, thus re-inscribing the desire for information.

While authors/creators/inventors are entitled to exclusive rights for the duration of the intellectual property,[88] non-exclusive rights are characteristic of Indigenous and traditional customary law and practice. These non-exclusive rights are in recognition of the continuing, living practice of the culture and the differentiation of individuals within that cultural community. This difference is of particular concern in the context of cultural symbols and artistic method:

> Aboriginal customary law, which gave the artist an entitlement to represent a particular theme, differed markedly from the general body of Australian law which recognised copyright. The fact that a work drew upon custom and tradition for its basis meant that contemporary works produced by Aboriginal artists represented a novel continuation of their very own ancient culture … To acknowledge the full copyright of an individual artist would be to deny the contribution of continuing living folklore to the particular artistic work and would give rights which the person did not have under traditional law. A copyright given without the limitations of tribal custom, and without debt to any body of tradition which might otherwise encumber it, might enable the individual artist to give or refuse permission to the reproduction of a work beyond that which he would be entitled to give under traditional law. Such non-exclusive rights were a particular feature of Australian Aboriginal law and were not readily compatible with the exclusive rights of copyright.[89]

[88] For instance, see the Australian Copyright Act 1968 (Cth) section 31.

[89] Bell R (1985b): 11:

In the context of copyright protection, and the problem of duration, moral rights protection may address some of these concerns. In Australia, the Copyright Amendment (Moral Rights) Act 2000,[90] introduced the moral rights of attribution and integrity to the Copyright Act 1968 (Cth).[91] However, for the moment, such rights attach only to individual authors, making few changes to the problems of protection for Indigenous intellectual property.[92] The proposed amendments to the Copyright Act in the form of the Exposure Draft Bill, the Copyright Amendment (Indigenous Moral Rights) Bill,[93] are intended to address this concern. However, this law continues to have serious limitations not only in the potential application, regarding the partiality of protection where restricted to attribution and identification, but also in the characterisation of community authority with respect to copyrightable material. The new law is intended to give effect to Indigenous communal moral rights but persists with a deferral of communal autonomy. The proposed amendments have been criticised as legalistic and complicated, and as presenting practical difficulties for remote communities. The proposed law will place the onus on communities to initiate contact with an individual commercialising the work, rather than recognising a duty of the individual towards the community in question.[94] In particular, Indigenous stakeholders consulted have criticised the amendments for this requirement of agreement between the creator and the community before such moral rights for

[90] Date of Assent: 21 December 2000.

[91] Copyright Act 1968 (Cth), Part IX. Terri Janke discusses the concept of moral rights, prior to their introduction in Australia, in Janke (1997): 117-18. See also Bell R (1985b): 12; and Gray S (1991): 16.

[92] For a more extensive review of the use of moral rights in the protection of heritage art, see Simons (2000).

[93] See the media release of the Department of Communications, Information Technology and the Arts, "Indigenous communities to get new protection for creativity works": DCITA (2003).

[94] Anderson (2004). Dr Anderson (ATSIC) describes these aspects of the law as presenting "serious obstacles for Indigenous people and communities seeking to protect their knowledge and its use."

Indigenous communities will arise.[95] Furthermore, this deferral of community is doubled in its effect: first in the disjunction between economic and commercial authority, and moral rights of attribution; and secondly in the aforementioned subjection of community to the "sovereignty" of the individual.

Defining moments

The discussion in this chapter has shown various ways in which conventional legislative regimes of protection are hindered by the definition of what comes within that protection. For example, copyright law is an inadequate means of protection because of its limited duration, its attachment to individual authors and the material form, and its requirement of originality. These same constructions of legitimate "Culture," simplicity of origin, and discrete and identifiable sites of creativity, persist throughout all constructions of intellectual property and across the categories:

> Any attempt legislatively to define in advance which "traditional" art works are protected and which are not would appear, therefore, to raise the danger of freezing Aboriginal art within the "authentic", "noble savage" category within which it has hitherto been confined. In addition, the almost exclusive emphasis upon the work of individual, traditional owners of designs means that many forms of Aboriginal art are in danger of "slipping through the net": that is, not receiving legislative protection or even consideration at all.[96]

Similarly, commercial adaptation of various forms of Indigenous and traditional knowledge, whether it be painting or agricultural techniques, may attract protection under the Copyright Act 1968 (Cth),[97] or may be found sufficiently novel or inventive

[95] See the Report of the Sixth Session, WIPO/GRTKF/IC/6/14 (14 April 2004): Paragraph 104. Note the discussion in Chapter 4 in the context of international efforts to protect traditional knowledge within intellectual property law. The Bill is currently in Exposure Draft state only, and is limited in circulation to those interests identified as stakeholders in its development at this early stage of drafting. It is therefore not possible to consider it in any further detail at the time of writing.

[96] Gray S (1996): 40.

[97] If it is found that the amount of the original work copied was not substantial (s14), and a sufficient amount of labour and skill has been invested in the adaptation, then such works of adaptation may meet the requirements for protection under the Copyright Act 1968 (Cth): s32. This application of principles

to be patentable under the Patents Act 1990 (Cth).[98] However, these regimes are limited in their ability to provide ongoing protection for Indigenous intellectual property as cultural heritage, as well as unable to offer any protection against the appropriation of intellectual resources by individuals outside the traditional community. Rather than protecting the form, *sui generis* regimes must protect the community's potential to protect its cultural diversity through the application of international norms to the management of its resources, cultural and biological, intellectual and social.

The discussion in this and the previous chapter has shown that personal property models cannot necessarily be reconciled with the kinds of interests or rights bound up in Indigenous and traditional intellectual practice, knowledge, and method. This artificial rendering of Indigenous and traditional culture is itself a commodification of that culture which cannot understand and preserve it in the way that is unique to the community itself.[99] The concept of community resources is not about the originality and immutability of the author, as in western law, but about the practice of the culture and integrity of the individual as well as the differentiation and continuation of the community.[100]

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of copyright law is of particular concern in that "custodianship" in technique never comes within protective mechanisms.

[98] Section 18 (patentable inventions). A more detailed analysis of the application of trade secrets and patents to bioprospecting is offered in Gollin (1993); and also in Lesser (1997): 120-121.

[99] Barron (2002): 62-69.

[100] Indeed, the issues paper *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, released by the Commonwealth Attorney-General's Department in 1994, recognises that communities "are continually evolving" and that sensitivity to this fact is vital in determining a culturally appropriate means of protection, and achieving that protection in consultation with Aboriginal and Torres Strait Islander people. See the following discussions of the report: Bell R (1985a): 6-8; Bell R (1985b): 8-9; Fulton (1995): 6-8; Golvan (1995): 51-52; Millar (1997-1998): 99; and Morris S (1998).

"Assimilation" of the value of Indigenous and traditional knowledge within western notions of property is an inadequate and often destructive means by which to protect traditional knowledge.[101] Intellectual property laws have been criticised for imposing pre-conceived individualistic concepts upon the customary values and knowledge that vest in the community.[102] Commentators have also examined the extension of moral rights to Indigenous and traditional knowledge interests.[103] However, whereas moral rights of creators of cultural works are recognised in copyright law and offer important dimensions to the protection of Indigenous art,[104] they are not recognised in patent law.[105] This reflects the basic difference, both social and legal, between the cultural and protective nature of copyright law, and the industrial and commercial application of patent law, which above all provokes further development of protected products and deploys the values of the collective benefit of research and the necessary disclosure of ideas. Nevertheless, the requirement of registration for patent and trade mark protection makes the introduction of exclusions potentially less complicated than any attempt to impose restrictions on copyright, as arising automatically, particularly in the context of freedom of expression.[106]

To date, the protection of traditional knowledge continues within the context of a collective risk, with respect to both cultural and biological diversity, as introduced in

[101] Barron (2002): 64-65; Janke (1998); Janke (1997); McDonald (1997).

[102] Similarly, international norms and the approach of individual human rights (notably, that of an international legal right to freedom of individual expression) are also limited in value in that they are "inapplicable to the role of the artist in traditional Aboriginal culture," Johns (1994): 178. See also Massey & Stephens (1998).

[103] *Our Culture Our Future* (1997).

[104] Simons (2000); Janke (2000c); Moorcroft & Byrne (1996). Note however the serious limitations, particularly in the context of the serious limitations of the proposed amendments in the area of Indigenous communal moral rights, discussed above.

[105] Blakeney (1997): 300.

[106] The interaction between current intellectual property protection and community resources is revisited in Chapter 9.

earlier chapters. The management of that risk is something in which a purposeful social collective or community is engaged towards the achievement of stability. As discussed, with the assumption of global responsibility should come recognition of customary law as integral to any effective international system for the protection of community resources. However, the way in which that global risk is transformed according to the commodities of knowledge or the components of biodiversity is problematic. How that "community" is to operate poses a complex and difficult question.[107]

The possibility of the relationship between international obligations, national codification, and community resources must be explored. The key forum in which international protection is currently being discussed is that of the WIPO IGC. The progress and activities of the IGC will be the subject of the next chapter.

[107] Introduced in this and the previous chapter with respect to the concerns over assumptions of "common heritage" and "global cultures," this is pursued in Chapter 6 in relation to biodiversity.

Chapter 4: Intellectual Property, International Trade, International Rights?

Introduction

The previous chapter considered in detail the conflict between community resources, traditional knowledge, and intellectual property models of protection, arguing that conventional intellectual property regimes do not accommodate ongoing cultural preservation in a model where private property rights and monopolies serve as the fundamental framework. Nevertheless, intellectual property remains the key platform upon which the question of international protection is being negotiated. The discussions of the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) are considered in detail in this chapter in order to examine the potential for protection within intellectual property frameworks, and the discussions towards achieving real public, political, and economic effect for customary laws within that protection.[1] The following chapter will continue to address the intellectual property paradigm, and will consider strategies that negotiate intellectual property laws in order to achieve "communal" models of access to knowledge, particularly in the context of new technologies.

[1] The recognition of customary law in the development of an international legal system is advocated by the representative of the United Nations Permanent Forum on Indigenous Issues, particularly in the context of the basic concept of free, prior and informed concept. See the Report of the Sixth Session, WIPO/GRTKF/IC/6/14 (14 April 2004): Paragraph 20. Also in the same Report (Paragraph 98), the representative of the Sámi Council similarly supports the development of protection that is consistent with the relevant customary laws of indigenous and traditional groups.

Territorial Intellects

While intellectual property laws continue to depend upon territorial definitions and application, it is important to be aware that community boundaries are not necessarily compatible or even related to national limits. Therefore, to subject the autonomy of traditional or Indigenous groups to national legislative bargains may further the "colonising" process with respect to their resources. It is necessary that the appropriate framework for protection be in the form of a global cooperation to which nation-states must refer, such that "community" might achieve effective autonomy within that "global" juridical framework. An internationalisation of the obligations towards the preservation of traditional knowledge may provide the only culturally relevant and legally effective context in which to sustain biological and cultural diversity.

To the extent that conventional intellectual property rights are conferred upon individuals in a particular country by domestic legislation, intellectual property rights continue to have a nationalistic border.[2] Therefore, while globalisation insists upon international normative laws, those laws are necessarily materialised at the national level. With the globalisation of intellectual property rights, through their inclusion on the WTO agenda, the relationship between national governments and intellectual property protection is about agreement on the fundamental economic incentives and justifications for international standards of protection.

The legitimating imperative of access to the international market can be seen in the endorsement of an international trading system by industrialised countries, and by implication, the recognition of minimum international requirements for the protection

[2] For instance, the Australian example includes those rights conferred by the Patents Act 1990 (Cth) and the Plant Breeders Rights Act 1994 (Cth).

of intellectual property, in order to access and participate in the global trading environment as sovereign national identities. The Australian Department of Foreign Affairs and Trade advocates coherent international laws in order to differentiate nationalisms according to strength in trade:

> Australia needs a strong, rules-based international trading system that guarantees access to overseas markets and provides a predictable and transparent international trading environment for our exports to grow. World Trade Organization (WTO) rules and disciplines are the key means of delivering this for Australian exporters.[3]

While an international infrastructure for the protection of intellectual property rights appears to hold potential for the development of protection for traditional knowledge based upon intellectual property regimes, the continuing relationship between intellectual property and the emphasis on access to a global market betrays the nationalist motivations driving mercantilist policies, and the link that is often presumed between trade surplus and political power.[4] This is apparent particularly in the emphasis on exports as the primary interest to be protected by domestic governments:[5] "most people tend to be nationalistic in their thinking about economic matters. Trade policy is by definition a nationalist policy in that it discriminates against foreign producers."[6]

The Subject Matter

Chapter 1 introduced in detail the basis for the concept of "community resources" that is being developed throughout this work, presenting community integrity and identity (through respect for cultural diversity) as the subject matter of protection, and tradition as the (paradoxical) incentive for creativity and innovation through

[3] Department of Foreign Affairs and Trade (DFAT), "Australia's Relationship with the World Trade Organization (WTO)" Submission to the Joint Standing Committee on Treaties, September 2000, at 3.

[4] Hoekman & Kostecki (2001): 21.

[5] DFAT (2000): 3.

[6] Hoekman & Kostecki (2001): 28 fn 9.

community responsibility to its narration and expression. However, for the purposes of the current discussion regarding developments within intellectual property frameworks, this chapter will continue to refer to "traditional knowledge." This is because intellectual property models are dealing with information, and "traditional knowledge," as the subject matter of exchange, dissemination, and development. This is quite distinct from the model of "community resources," which presents community, cultural diversity, and practice as the subject matter of protection, in which traditional knowledge is included, but is not the exclusive subject matter of protection, trade, and exchange. Therefore, this chapter is dealing with present systems of possible management of traditional knowledge, rendered as objects of international trade (as information), rather than invoking a model based upon community resources in this instance. The discussion here is a step towards a *sui generis* system, but remains compatible with current international intellectual property rights.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

As discussed earlier, intellectual property can be understood broadly as information that has economic value when put into the international market place. As information, it cannot be exhausted. What intellectual property laws do is place an artificial scarcity upon that information, granting monopoly rights to owners. This willingness to assert the nature of property in respect of information can be seen even in the language of the lobbying that led to the TRIPS Agreement. For instance, intellectual property advocates the use of words like "piracy", "stealing", and so on, indicating the central rationale of fundamental property rights, as natural rights,[7] rather than

[7] Pretorius (2002): 183.

acknowledging their artificial creation through statute and policy. Intellectual property rights are in fact contingent upon the state legislature. They are not inherent rights, and yet, for example, the pharmaceutical industry in particular lobbies strongly upon a platform of just and fair returns for commercial investment, leading to a debate that is couched in emotive, moralising rhetoric.[8] Such international standard setting is dominated by the United States, European Union, and international business, and may indeed be contradictory to the development policies of the international trade community.[9]

Furthermore, with the internationalisation of intellectual property standards, what counts as intellectual property, that is, what counts as innovation, is determined not only by western standards (in that the industrialised nations have dominated the setting of standards in intellectual property), but also western needs.[10] This is not a question of public needs, but industry needs; that is, international intellectual property protection is dominated by the needs of western style intellectual property industries and the protection that is required to achieve the maximum efficiency and commercial value of those industries. As considered in the previous chapters, intellectual property therefore facilitates the exploitation of traditional and Indigenous knowledge, by excluding it from protection (through the criteria set by western styles of knowledge generation and concepts of innovation and creativity) and simultaneously facilitating its removal from communities and protecting the forms in which that removal is contained (the objects of intellectual property created by the private industries). An economic analysis of rights has come to dominate the development of intellectual

[8] Pretorius (2002): 183.

[9] Drahos & Braithwaite (2002); Dutfield (2003).

[10] Dutfield (2003): Chapter 8; Drahos & Braithwaite (2002).

property law.[11] Indeed, the globalisation of intellectual property law arguably is motivated by economics (the economic value of knowledge, including the branding seen in trade marks and geographical indications). On the other hand, the notion of moral rights (the right of attribution or recognition, and the right of integrity that prevents the mutilation of a work) receives much less uniform acceptance and enforcement.

If an appropriate international framework for traditional knowledge is to be achieved, negotiations towards adequate protection must not result in a globalisation of legal orders that essentially gives effect to those with the greatest lobbying power, continuing the emphasis upon international trade as the fundamental measure for international relations. This can be argued in respect of intellectual property rights, where we see that the globalisation of intellectual property rights seemingly undermines stability in relation to the materialities of local culture, in that the centralised power to which those rights refer is necessarily beyond the local community. By framing priorities in the context of international trade, that centralised power is increasingly a "commercial" community, an industry, rather than a juridical one: "Power is seen as inhering more and more in other entities 'besides' the nation-state – sub-national and international regions and transnational corporations being the most cited repositories."[12]

With the escalating importance of an international trading system and access to an international market, domestic legislation becomes increasingly "globalised" or

[11] See the discussion of the negotiations towards TRIPS in the context of copyright and moral rights, and the perceived domination of intellectual property frameworks by "a market-based, economic analysis of copyright over a more 'humanistic' perspective," in Gervais (2003b): 125-26.

[12] Fitzpatrick (2000): 3.

harmonised[13] with international requirements. While intellectual property rights are historically individual rights, increasingly they have become issues of national concern, with members of the international trading community assuming responsibility for the enforcement and protection of those rights on behalf of their powerful industries.[14] In fact, by making individual intellectual property rights the responsibility of the WTO, that is, by making these individual rights an issue of trade between states, intellectual property breaches can in fact be attacked in broader ways. Powerful major industries may exert sufficient pressure on their governments such that the government may be willing to assist this major industry or even an individual firm (such as a large pharmaceutical company) by acting against another state which can be held responsible for a TRIPS breach. So where actions to enforce an individual's right have failed, those individual property rights may become issues of state relations. In such circumstances, the international legal framework is invoked to deal with intellectual property rights and their "theft" or "misappropriation" as phenomena, rather than as disputes between individuals.

The Convention on Biological Diversity (CBD)

The CBD is a potentially significant international instrument in the development of rights in Indigenous and traditional resources and is discussed in greater detail in the following chapter, but a basic outline of its relevance to the relationship between intellectual property, trade, and community is useful at this point. The CBD is based on national sovereignty over natural resources and aims to provide for the equitable sharing of the benefits derived, thereby in turn re-invigorating national sovereignties with respect to biological and intellectual resources. At the same time, the text

[13] For a discussion of this globalisation of standards in the context of patents, see Park (2001).

[14] See the earlier discussion in Chapter 4.

recognises the traditional knowledge of Indigenous and local communities.[15] However, both the ongoing refusal by the United States to ratify the Convention and the ultimate subjection of local autonomy to national sovereignties greatly compromise the potential for international harmonisation of approaches to the protection of traditional knowledge, other than within international economic frameworks.

In order to address the emerging importance of the traditional or Indigenous community as legal actor, and how this might be given any real effect within an international context, it is adequate for the purposes of this chapter to note the significance of the CBD in putting forward a framework for communal custodianship and benefit-sharing, which is explored in greater detail later. The CBD emphasises local effective autonomy in contrast to the monopolies that are protected in the international intellectual property framework created by the TRIPS Agreement. Furthermore, the relevance of the CBD will become clearer if an international *sui generis* system is to be advocated, and in various attempts to implement *sui generis* laws towards the protection of traditional knowledge. Nevertheless, significant problems persist, and these are given greater treatment in the following chapter.

WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore

Despite the obvious concerns regarding assimilation of traditional knowledge (and traditional knowledge systems) within an intellectual property model, because of the potential commercial value of these resources and the relationship of commercial interests to these resources as commodities, the seemingly logical and rational international forum in which to consider the protection of traditional knowledge

[15] Preamble, Article 8(j).

continues to be that of intellectual property. This approach betrays the fundamental misunderstanding of the subject-matter of protection, that is, the autonomy and self-governance of communities through their traditional relationship to their resources, ultimately reducing the subject-matter to that of property in those resources. Whether those property rights are communal or otherwise, the injustice this form of regulation perpetrates upon communities persists. It is important, therefore, to consider the current attempt at international cooperation towards protection, especially given the recent acknowledgment of the urgency for this protection.

The WIPO IGC is currently addressing issues of access to genetic resources, the protection of traditional knowledge (including knowledge, innovation, and creativity), and the protection of traditional cultural expression (including handicrafts).[16] The 30th Session of the General Assembly of WIPO decided upon an extended mandate for the IGC, requiring the IGC to accelerate its work on, among other things, the protection of traditional knowledge, including the possible creation of an international framework or instrument(s) towards achieving this protection. It was announced in September 2003 that work would accelerate towards achieving such protection, within the context of intellectual property aspects in that knowledge.[17] Therefore, it is essential to understand and examine the discussions and deliberations of the IGC, and for these reasons, it is necessary to trace the analyses and considerations to date.

At the Fourth Session held in Geneva in December 2002, the Committee considered a draft study,[18] prepared at the invitation of the Conference of the Parties to the CBD,

[16] An overview of the role of the WIPO IGC, participation, activities and outcomes, and all documents, are provided at http://www.wipo.int/tk/en/igc/index.html.

[17] See the WIPO Press Release, "WIPO Member States Agree to Fast-Track Work on Traditional Knowledge." WIPO PR/2003/362 (29 September 2003).

[18] WIPO/GRTKF/IC/4/11 (20 November 2002).

on disclosure requirements for patent applications relating to genetic resources and traditional knowledge, and worked towards the generation of legal measures that could be practically implemented in the protection of traditional knowledge and cultural expression.[19] Presentations from various countries noted problems for traditional knowledge under current existing intellectual property law, including originality, fixation, differences in policy and ownership concepts under customary law, the need for protection of ideas as distinct from the expression or form of that idea, the emphasis on the author's identity, and duration of protection.

Following on from discussions at the Fourth Session of whether existing intellectual property regimes are sufficient or whether *sui generis* systems are necessary to achieve protection of traditional knowledge, the IGC noted that *sui generis* protection need not involve the implementation of an entirely separate and specific legal system. The IGC considered that adaptation or extension of current existing intellectual property frameworks may be adequate through the introduction of *sui generis* elements into that framework.[20] This reflects the perspective of a number of Committee Members, in a move towards a tolerable but certainly not optimal approach, that a consideration must be made of how existing mechanisms of intellectual property might be more effectively utilised to protect traditional knowledge, without the need for a separate legal regime.[21] As the IGC explains, "Alongside any distinct *sui generis* intellectual property systems specifically created

[19] WIPO/GRTKF/IC/4/8 (30 September 2002).

[20] WIPO/GRTKF/IC/4/8 (30 September 2002): 2. In the WIPO Report, *Minding Culture* (2003), Australian Indigenous lawyer, Terri Janke, undertook eight case studies in order to gather information on the practical utilisation and application of conventional intellectual property protection to traditional cultural knowledge and expression, and to consider the successes and difficulties arising from those uses of the conventional legal system.

[21] WIPO/GRTKF/IC/4/8 (30 September 2002): 3.

for TK as such, there can be *sui generis* elements of general intellectual property law that may be relevant to TK subject matter."[22] Arguably, the need to make any system of protection both harmonised and acceptable within the context of international trade and intellectual property will have significant influence on the development of protection regimes. Indeed, the importance of international trade relations is one of the considerations put forward by the IGC in favour of protection based on intellectual property models rather than a separate *sui generis* regime:

> As an outcome of the Uruguay Round negotiations, many developing and least developed countries have accepted the obligation to establish high standards of intellectual property protection, as a means of promoting free trade. It may be argued that biodiversity, and the traditional knowledge associated with using it in a sustainable manner, are a comparative advantage of those least developed countries that are biodiversity-rich, enabling them to participate more effectively in global markets and thus rise above the current levels of poverty and deprivation. This is an example of how protection of traditional knowledge at the national and international levels may be seen as a potentially powerful tool for advancing the integration of least developed countries into the global economy.[23]

However, as argued earlier, ultimately an adaptation of conventional intellectual property law to traditional knowledge will be inadequate and unsystematic, achieving a merely partial and fragmentary response to a critical issue. With this is mind, it is interesting to note that the IGC has identified the possible development of a *sui generis* form of international protection for traditional cultural expression (for which revisions to the 1982 Model Provisions on the Protection of Expressions of Folklore developed by UNESCO and WIPO,[24] will provide a significant basis) as a means by which to achieve protection, whether that be through the introduction of *sui generis*

[22] WIPO/GRTKF/IC/4/8 (30 September 2002): 5.

[23] WIPO/RT/LDC/1/14 (29 September 1999): Paragraph 10. See also WIPO/GRTKF/IC/4/8 (30 September 2002): 9.

[24] UNESCO-WIPO. (1982). Model Provisions for National Laws on The Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. 1985.

elements or through a more complete response of a *sui generis* system to address the special issues of genetic resources, traditional knowledge, and folklore. Of particular interest in the context of these developments, is the composite study on traditional knowledge protection of the Fifth Session of the IGC.[25] This study not only deals with definitions of traditional knowledge, but also the policy issues arising from the protection of traditional knowledge within intellectual property regimes. Importantly, this document addresses options for *sui generis* protection, following a comprehensive review of systems currently in operation, which will be discussed in more detail later in this chapter.

Particularly in view of the IGC's ongoing discussions of model national laws in the context of international protection, and in the context of the Report and accompanying documents of the Fifth Session (July 2003),[26] the recent Report of the Sixth Session (March 2004) released in April 2004,[27] and the preparatory documents of the forthcoming Seventh Session (November 2004),[28] it is important to consider the concept of community as it may operate within a *sui generis* system as distinct from attempting to realise community autonomy through its translation within an intellectual property model. Later chapters will continue to examine and develop the way in which the communal nature of traditional resources resists the individualistic rendering of rights-based systems, whether intellectual property rights or international human rights, where the individual is of primary normative significance. In effecting an economic rights-based system of protection, group interests and individual

[25] WIPO/GRTKF/IC/5/8 (28 April 2003).

[26] All documents of the Fifth Session are available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=4795

[27] WIPO/GRTKF/IC/6/14 (14 April 2004).

[28] Preliminary documents of the forthcoming Seventh Session are available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=6183

participants are "generalised" as a kind of "legal person" operating as the "object" of those rights and property interests, while maintaining the emphasis on the authority of the individual necessary to the westernised economies of property and legal relations considered in the previous chapters. The compelling question for the current discussions towards adequate protection of traditional knowledge is the possibility for communal authority within a workable legal paradigm.

The documents of the Sixth Session reiterate the importance of seeking clarity for traditional knowledge protection in the form of an international framework, through the cooperation of various members of the international trading community.[29] The forthcoming Seventh Session will consolidate upon the defensive protection of traditional knowledge within the patent system,[30] including the review of responses to a questionnaire on this relationship,[31] as well as addressing specifically the participation of Indigenous and local communities in the protection of traditional knowledge.[32] Thus, it would appear that the potential for recognising and protecting the sovereignty of Indigenous and traditional groups in the management of their resources is vested in the international community, and the possibility of mobilising the value of Indigenous and traditional management is to be found within the global context of cultural diversity, and indeed in biodiversity (as discussed in the next chapter), rather than the localised deprivation sustained by conventional intellectual property rights. This is not to create a problematic dichotomy between the local "Indigenous" and the global "International." Rather, it is to resist the conventional

[29] The documents from the Sixth Session are available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=5412

[30] WIPO/GRTKF/IC/7/8 (23 July 2004).

[31] WIPO/GRTKF/IC/Q.5 (July 2004).

[32] WIPO/GRTKF/IC/7/12 (15 July 2004).

historical and geographical sentimentalisation of community, and to enliven "community" as a legal actor within a global context beyond the deprivation of place. Working towards a system of community resources, it is a necessary condition to give individual communities legal effect within a *sui generis* system whereby community is generated through the interrelationships between members and through the interaction with other communities, rather than contrived within the deprivation and boundary-making of place.[33] Effective recognition of the autonomy and dignity of Indigenous and traditional communities, and the intrinsic relationship between the practice of customary law and respect for cultural diversity, is a critical foundation for community resources. In this way, a particular community will not be defeated by the perceived "modernising" effect of global forces upon the traditional community, and can achieve access to the political, social, public sphere.

1. The Fifth Session: Defending Knowledge

The Fifth Session of the IGC, staged in Geneva, 7 to 15 July 2003, was particularly concerned with defensive efforts to document traditional knowledge and to characterise the aspects of traditional knowledge that would be assimilable within intellectual property systems. The question of access to genetic resources and benefit-sharing was also a major topic for consideration at the Fifth Session, conceptualising the commercialisation of traditional knowledge within an economic framework.

Towards understanding and particularising the relationship, if any, between protection of traditional knowledge and intellectual property systems, the IGC requested for consideration a consolidated survey of national experience with intellectual property

[33] This geo-historical limitation of community, considered in detail throughout, is necessarily revisited in the following chapters dealing with biodiversity, rights to land, and to an extent, the right to self-determination.

protection, as well as a composite study on traditional knowledge protection.[34] Responses were provided from Australia, Canada, Colombia, Costa Rica, France, Italy, Kazakhstan, Mexico, Republic of Moldova, New Zealand, Portugal, Russian Federation, Samoa, Venezuela, and Viet Nam.

1.1 Examples of the Use of Conventional IP Law in Protecting TK

Together with similar responses to an earlier questionnaire, at the Fifth Session the IGC considered responses to the following request: "Could you please explain by means of concrete examples how currently available standards of intellectual property have been used to protect TK"[35]

The response from Australia detailed the application of confidential information, copyright infringement, trade practices (misleading or deceptive labelling as to the authenticity of the product), and the finding of a fiduciary duty on the part of the artist to the community. The IGC noted, however, that Australia has no specific provisions in its patents, trade marks, and designs legislation to protect traditional knowledge (although limited use of certification trade marks as a means of identification or authentication, and the use of trade marks by arts centres, are mentioned). However, amendments to the Australian Copyright Act are proposed to take account of communal moral rights.[36] As discussed in more detail in the previous chapter, the Exposure Draft Bill, the Copyright Amendment (Indigenous Moral Rights) Bill is intended to give effect to Indigenous communal moral rights, with its introduction

[34] WIPO/GRTKF/IC/5/INF/2 (4 April 2003). This document, "Information on National Experiences with the Intellectual Property Protection of Traditional Knowledge," contains the responses to questionnaires on TK protection in WIPO/GRTKF/IC/2/5 (8 August 2001) and WIPO/GRTKF/IC/Q.1 (July 2002).

[35] WIPO/GRTKF/IC/Q.1 (July 2002): Question c.

[36] See the media release of the Department of Communications, Information Technology and the Arts, "Indigenous communities to get new protection for creativity works": DCITA (2003).

into the Commonwealth Parliament expected later this year. Nevertheless, these amendments have been criticised by Indigenous groups for the limited commitment to communal autonomy, particularly in the requirement of agreement between the creator and the community before such moral rights for Indigenous communities will arise, potentially undermining communal authority with respect to the knowledge at stake.[37]

Other developed countries similarly could not show specific protection of traditional knowledge other than comparable and potentially problematic adaptations of existing intellectual property law in order to assimilate traditional knowledge. Canada cited the examples of copyright, trademarks (including certification marks), and trade secret protection or confidentiality agreements. New Zealand noted no specific provisions directed to the protection of traditional knowledge, but explained the application of trade marks (particularly decisions against registration based on the likelihood of offence to a significant section of the community, including Māori). The New Zealand Trade Marks Act 2002 provides for a Māori Advisory Committee,[38] and at the time of the prepared response to the questionnaire, the then proposed new laws[39] were considered to be another discrete aspect of protection (rather than a comprehensive answer in and of itself).

Furthermore, in the Sixth Session, the Delegation of New Zealand noted that the success of Māori appeals to the moral and ethical responsibility of corporations, for the purposes of defeating misappropriation of Māori knowledge, has been limited.

[37] WIPO/GRTKF/IC/6/14 (14 April 2004): Paragraph 104.

[38] At the time of the Sixth Session, the Committee had assessed approximately 251 trademarks containing Māori text and imagery of which 6 had been found likely to be considered offensive to Māori.

[39] See the NZ Ministry of Economic Development Discussion Paper released 13 May 2003: MED (2003).

Similarly, the representative of ATSIC reported that the use of intellectual property protection by Indigenous Australian peoples was also limited, and the ability to rely on alternative measures (such as contractual obligations) was problematic in that it depended upon similar appeals to corporate responsibility. [40] Nevertheless, the laws do emphasise the need to seek the consent of communities, where text or imagery is to be used, in stark contrast to the way in which community authority with respect to traditional knowledge is constructed in the proposed amendments to the Australian Copyright Act 1968. This requirement for the prior informed consent of communities is crucial to achieving genuine customary management of knowledge, and is a critical aspect of the system of community resources proposed in this work.[41]

Despite these important fundamental aspects of the New Zealand laws, and the significant way in which New Zealand's trade mark laws address the possibly inappropriate use of Māori words and imagery as marks, this cannot be considered a mechanism for the protection for cultural expressions more generally.[42] These laws do work, to an extent, in concert with laws concerned with "authenticity," for which the toi iho Māori Made Mark was launched in February 2002, as a way to certify genuine Māori articles.[43]

The response also noted the potential protection of traditional knowledge by patents, and is currently reviewing the Patents Act 1953[44] to determine possible exceptions to

[40] WIPO/GRTKF/IC/5/INF/2 (4 April 2003): Annex 1, page 13.

[41] See further the discussion of free and prior informed consent in Chapter 6.

[42] WIPO/GRTKF/IC/6/14 (14 April 2004): Paragraph 41.

[43] More information on the Toi Iho mark can be found at the site of the Creative New Zealand, Arts Council for New Zealand Toi Aotearoa. http://www.creativenz.govt.nz/funding/other/toi_iho.html. Recall earlier discussions of authenticity as a (potentially problematic) defensive means of protection, in the context of certification marks, documentation, and other means.

[44] A summary of the Māori submissions to the review of the Patents Act can be found at the Ministry of Economic Development: MED (2004).

patentability, ways in which to determine traditional knowledge as prior art, and other issues of concern to Māori communities. New Zealand has agreed in principle to the establishment of a Māori Consultative Committee on the recommendation of the Royal Commission on Genetic Modification and is also considering a similar review of the Plant Variety Rights Act 1987.[45]

Trade marks and geographical indications were common examples throughout the responses of both developed and developing countries. Trade marks were provided as examples by Colombia, Costa Rica, and Samoa. Both forms of protection were identified as examples by France, Italy, Portugal, Mexico ("appellation of origin"), and the Republic of Moldova. Venezuela, like Portugal and Mexico, applies a system of appellations of origin to protect some traditional knowledge.

The Russian Federation proposed protection of traditional knowledge under the patent system (providing examples of method and product patents, including national industrial enterprises and medicines). Also proposed is the protection of works of national creation through the granting of patents as industrial designs, on the basis that many art products are made and considered to be industrial designs, and through geographical appellations. While this explanation suggests an important and relevant departure from the usual construction of intellectual property according to individual creativity, it nevertheless raises the problematic issue of a conflation between

[45] The New Zealand Cabinet agreed to policy proposals arising from the review of the Plant Variety Rights Act 1987, in the Cabinet Paper released 8 August 2003: MED (2003). The Cabinet recommended amendment of the Act to prevent the creation of plant variety rights in mere discoveries, and noted also the concerns of Māori over the patenting of life forms. However, it was noted that the provisions of UPOV 78 do not provide for refusal of a patent on the grounds of cultural offence. The Cabinet also considered the role of possible amendment to the PVRA in addressing concerns in the WAI 262 Claim, currently before the Waitangi Tribunal, which which alleges that the Crown has breached its obligation to protect the cultural and intellectual property of Māori.

community and nation, within which community autonomy is inevitably subjected to national sovereignty.[46]

Viet Nam provided three examples: a patent for the traditional preparation of medicinal plants relating to drug addiction, a trade mark for the traditional balm of medicinal plants, and an appellation of origin for Phu Quoc fish soya sauce.

The Republic of Kazakhstan did not introduce intellectual property laws until 1999, but these laws are based upon the traditional knowledge of Kazakh people. For instance, the laws provide for the patent protection of the method of producing kumis, or mare's milk (Patent of the RK, No 33) as well as other examples, all attributed to traditional knowledge. Furthermore, national clothes, carpets, decorations, and other similar types of materials, are protected as industrial designs. Designations containing elements of Kazakh ornament are registered and protected under these new laws as trademarks. Therefore, the laws are presented as intellectual property laws, but are implemented upon the sound infrastructure of recognition of traditional knowledge.

Despite some important adaptations of intellectual property systems to accommodate traditional knowledge protection, the various responses to this questionnaire show the persistence in these systems of the obstacles to community autonomy, examined in detail in the previous chapters – the origination and in-imitativeness of traditional knowledge rendered as information, and the often difficult negotiation of protection in the context of the international trading system, particularly in attempts to address rights in perpetuity and the duration of protection.

[46] Further discussion of this problematic relationship between national sovereignty, development, and community autonomy is undertaken in Chapter 6, in the context of the CBD and access to natural resources.

1.2 Description of sui generis systems for the protection of TK

To questions regarding enacted or planned *sui generis* laws for the protection of traditional knowledge, only Brazil, Panama, Peru, Portugal, Kenya, and the Philippines were able to respond, showing the resistance in developed countries to the consideration of traditional knowledge apart from intellectual property systems. Notably, these *sui generis* systems, while somewhat framed by intellectual property systems, begin to address many of the critical aspects of community resources, including prior informed consent of communities, community management of resources and the relevance of customary law, and perpetuity of protection (and therefore the "value") of traditional knowledge.

Brazil has a specific law regulating the protection of and access to traditional knowledge, the Provisional Measure No 2.186-16 of August 23, 2001. Brazil also has plans to establish the Genetic Heritage Management Council. The law regulates access to genetic heritage, access to traditional knowledge relating to the genetic heritage and relevant to the preservation of biodiversity, the fair and equitable distribution of benefits, access to technology and technology transfer related to biological diversity, and provides for the acknowledgment of origins of genetic resources. Human genetic heritage significantly is excluded from patentability. The intellectual property is owned by the community and the rights are granted on an exclusive basis. Significantly, however, the protection of traditional knowledge in patents is limited in time, on the basis that there is a clear distinction between traditional knowledge strictu sensu and inventions stemming from its inventive use.

Law No 20 of Panama, entitled "Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their

Cultural Identity and their Traditional Knowledge, and Other Provisions," came into force in 2000 and aims to protect and defend the traditional knowledge and intellectual property rights (as collective and vesting in communities) of Indigenous peoples in relation to creations and cultural elements, through a special system of registration, promotion, and commercialisation of their rights. These rights are granted as exclusive rights that are not limited in time. This legislation is particularly notable for its emphasis on the collective rights of Indigenous peoples in relation to traditional knowledge. First, traditional knowledge is identified with a community, suggesting the relationship between community and resources that is fundamental to the model proposed in this work. Second, the laws recognise the problem of duration, and provide for the possibility of perpetual collective rights in traditional knowledge. Genetic resources are expressly excluded from protection.

Peru provides a law for the protection of the collective knowledge of Indigenous peoples and the fair and equitable distribution of benefits derived (Law No 27811). Use of that knowledge is also promoted "for the benefit of the indigenous peoples and mankind in general." Confirming the perhaps merely aspirational principles of the CBD with respect to local Indigenous communities, the law provides for prior informed consent. Of special importance to the issue of biopiracy, the law insists upon the consideration of traditional knowledge as prior art relevant to the examination of the novelty and inventiveness of patents. In contrast to other states, Peru provides for the protection of collective knowledge associated with genetic resources. This is of particular interest in that exclusion of genetic resources may indeed deprive communities of important access to resources. However, the law does not negotiate the problems raised where traditional knowledge has entered the public domain (perhaps one of the most important concerns for protection). Under Peruvian law,

collective knowledge that is in the public domain is exempted from some provisions.[47] Rights of Indigenous peoples in their collective knowledge are exercised through representative organisations and, like Panama, do not expire or lapse.

Portugal provides for a legal regime relating to traditional plant genetic resources, but excludes from protection traditional knowledge that is the subject matter of specific industrial property registrations. Eligibility for registration of traditional knowledge may be met by any public or private, individual or collective entity that is representative of the geographical zone where the local variety is dispersed. Registration of traditional knowledge expires after a renewable period of 50 years from the date of application.

Kenya provides for a system of protection of traditional knowledge of plant and animal resources in which the problem and inapplicability of inventiveness and novelty to the eligibility of traditional knowledge is explicitly identified. Rights are conferred, and procedures and formalities created, on the basis set down in the CBD, with enforcement on an agreement basis (raising the problem of potential imbalances in bargaining power). The duration of rights is not yet clear, but the system is understood as complementing the existing intellectual property regimes on patents (with the appropriate modification of the requirements of novelty and inventiveness).

When reported to the IGC, Senate Bill No 101, "An Act Providing for the Establishment of a System of Community Intellectual Rights Protection," was pending before the Philippine Senate. Still in its draft form, the Community Intellectual Rights Protection Act (CIRPA) deals with plant and genetic resources, as

[47] The need to provide *sui generis* systems of protection for TK and expressions of culture in the public domain, is recognised by the Delegation of New Zealand in the Report of the Sixth Session (WIPO/GRTKF/IC/6/14): Paragraph 41.

well as traditional agricultural methods and technologies, with a community eligible as owners. The Explanatory Note of the Draft explicitly acknowledges capacity and authority in local communities themselves: "biodiversity has been and should remain the commons of local communities with both resources and knowledge being freely exchanged among different communities who are also users of the innovation."[48] Furthermore, the Draft calls for protection other than through assimilation within intellectual property models of innovation and knowledge generation, and "seeks to re-define innovations to recognize both the collective and cumulative intellectual right of the country's cultural communities over the same innovations," without requirements of fixation or documentation for the purposes of protection.[49] This approach becomes particularly informative when considering the questions raised over documentation of traditional knowledge within intellectual property systems and presents a particularly insightful example towards the development of a system for community resources.

1.3 Documentation and Traditional Knowledge

Of particular concern to many Indigenous and traditional groups is the mechanism of documentation of traditional knowledge for the purposes of constructing its originality, visibility, recognisability,[50] and the relationship of this process to ongoing customary control and management of that knowledge. The effort to ensure that the

[48] Republic of the Philippines. Community Intellectual Rights Protection Act – CIRPA (2001, Draft).

[49] CIRPA (2001, Draft).

[50] For instance, documentation is cited as an important means by which to record traditional knowledge for the purposes of its recognition as prior art in patent applications. See the discussions in the WIPO IGC, and in particular the draft toolkit proposed in WIPO/GRTKF/IC/4/5 (20 October 2002); practical mechanisms for defensive protection in WIPO/GRTKF/IC/5/6 (14 May 2003); defensive protection measures in WIPO/GRTKF/IC/6/8 (15 December 2003); and the ongoing emphasis on documentation in the documents of the forthcoming Seventh Session in WIPO/GRTKF/IC/7/8 (23 July 2004), dealing with recognition of traditional knowledge within the patent system.

commercial use of traditional knowledge does not compromise the control over that knowledge by Indigenous or traditional groups is based on the objective to reconcile protection within international intellectual property regimes. A major feature of the IGC's proposals for protection of traditional knowledge is that of mandatory documentation of traditional knowledge as a prerequisite for protection. This is set out in the Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge[51] and in contributions to the Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources.[52]

The Toolkit, the further development of which was approved at the Fifth Session, is devoted to the management of the intellectual property implications that arise through the use, manipulation, and recording of traditional knowledge and intellectual and biological resources.[53] The IGC has identified the importance of ensuring that any documentation process serves the interests of traditional knowledge holders, and that the ongoing control and management of traditional knowledge by Indigenous and traditional communities is a priority. At the Fifth Session, the Report on the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources[54] indicated the need to clarify the management of documentation mechanisms with a view to maintaining the interests and indeed control of Indigenous and traditional groups in the subject matter of that documentation. However, the

[51] WIPO/GRTKF/IC/4/5 (20 October 2002).

[52] WIPO/GRTKF/IC/4/14 (6 December 2002).

[53] Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge: WIPO/GRTKF/IC/4/5 (20 October 2002). The further development of the Toolkit was considered in the Fifth Session in the Report on the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources. WIPO/GRTKF/IC/5/5 (1 April 2003).

[54] WIPO/GRTKF/IC/5/5 (1 April 2003).

operation of this mechanism and the impact on community is a concern of Indigenous and traditional groups:

> WIPO's toolkit purporting to offer States model laws for integration into national legislation to protect cultural expressions and artforms is inadequate and inappropriate in many aspects. For example, these model laws propose creating "competent national authorities", in effect designating States as the gatekeepers for the use of Indigenous knowledge. The only competent decision makers regarding the protection and use of Indigenous knowledge are the Indigenous peoples themselves.[55]

The practice of documentation raises some concerns in that it may be contradictory to control over or limitation of the dissemination of particular cultural knowledge. Significantly, this concern is acknowledged in the preparatory documents of the forthcoming Seventh Session, where the importance of the prior informed consent of communities, in respect of publication and dissemination of traditional knowledge, is emphasised.[56] The way in which the Seventh Session negotiates the ongoing development of defensive mechanisms of protection in view of the need to address potential conflict with traditional knowledge systems will be of critical interest in the Report of that meeting when released.

The ongoing emphasis on defensive mechanisms, and the need to document and record information as a solution to exploitation of customary resources, indicates the dominance of western legal and ideological structures in managing these issues and the ongoing relevance of processes of origination and in-imitativeness in declaring the value (and thus protectability) of knowledge. It is of major importance to the discussions that Indigenous, local, and traditional groups are not merely consulted, but indeed are instrumental in the creation of mechanisms that are culturally relevant as well as acceptable to the legal and commercial interests that are inevitably concerned

[55] IPCB (2004b).

[56] WIPO/GRTKF/IC/7/8 (23 July 2004).

here.[57] Delegates to the WIPO discussions have identified the considerable concerns and indeed suspicion of many Indigenous and traditional groups, and the IGC has responded by making documentation an issue for the community itself. Towards this, the purpose of the Toolkit is to provide practical mechanisms by which to protect knowledge in circumstances where the particular community concerned has made such a decision, or indeed, where information has entered the public domain for any other reason.

Current reform of international patent law is therefore of immediate relevance, and in this context the Member States of WIPO have agreed to develop additional classification schemes in order that traditional knowledge is adequately protected within the international patent system. At the 32nd session of the Committee of Experts of the IPC Union, staged in February 2003, the report of the Task Force on the Classification of Traditional Knowledge was considered, with proposals subsequently submitted to the IPC Revision Working Group.[58] At the meeting in Geneva in June 2003, the Working Group on the International Patent Classification (IPC) concluded, amongst other things, that additional classification schemes must be devised to include traditional knowledge such that inventions based on this knowledge are required to acknowledge those origins,[59] and approved the revised

[57] In the Report of the Fifth Session, the unanimity of Members regarding the importance of community participation was recognised, following a report commissioned to examine more formalised participation: WIPO/GRTKF/IC/5/15 (4 August 2003).

In the recent Sixth Session, the importance of this participation was actualised in "Participation of Indigenous and Local Communities," which also considered practical steps taken towards achieving participation. WIPO/GRTKF/IC/6/10 (10 December 2003).

[58] Special Union for the International Patent Classification (IPC Union), Committee of Experts, 32nd Session, staged 24-28 February 2003, Development of Classification Tools for Traditional Knowledge, IPC/CE/32/8 (4 February 2003). See also from the 34th Session, staged 23-27 Feburary 2004, Development of Classification Tools for Traditional Knowledge: IPC/CE/34/8 (19 January 2004).

[59] Documents for the Ninth Session of the Working Group (IPC/WG/9) are available at http://www.wipo.int/classifications/en/ipc/w_groups/revision/9/index.htm

proposal at its Tenth Session, at the end of 2003. These schemes include proposed modifications to the international patent system (in searches and examinations, for instance) in order to protect traditional knowledge and genetic resources from becoming the subject of illegitimate patent claims.[60] Towards achieving this, the Committee completed the extensive Draft Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, as requested by the Conference of the Parties to the CBD.[61] Issues addressed in this Study include the potential for a requirement for disclosure of origin (where traditional knowledge may provide the origin of developments) to ensure adequate attribution of traditional knowledge that is developed into patentable subject matter.[62]

Nevertheless, these proposed modifications to the international patent system (in searches and examinations, for instance) amount to what may be described as mere defensive actions to protect traditional knowledge and genetic resources from becoming the subject of illegitimate patent claims. Ultimately, such schemes assimilate traditional knowledge within the intellectual property model of which such documentation is a significant element, possibly even making it more readily available for commercial exploitation without developing positive attempts at culturally relevant management.

1.4 Conclusions of Fifth Session

In the light of the Draft Technical Study, the CBD represents an important departure from the construction of traditional knowledge within the economic analysis of

[60] See the Survey of Possible Patent Classification Aspects Relating to Components of Biodiversity and Traditional Cultural Expressions (Expressions of Folklore), Appendix 1, Development of Classification Tools for Traditional Knowledge. IPC/CE/34/8 (19 January 2004).

[61] WIPO/GRTKF/IC/5/10 (2 May 2003).

[62] WIPO/GRTKF/IC/5/10 (2 May 2003).

intellectual property rights. Although framing the discussions within intellectual property standards, the WIPO IGC has nevertheless ensured the continuing relevance of other international systems, such as that of the CBD, which indicate a need to re-conceptualise the agents of any rights developed in the protection of traditional knowledge. However, as will be seen, defensive measures within intellectual property systems continued to dominate discussions in the Sixth Session, and inform the preparatory materials for the forthcoming Seventh Session.

2. Sixth Session: Internationalising Tradition

The Sixth Session of the IGC was staged 15-19 March 2004 and, as mentioned, extended discussions on defensive measures for protection. It also sought to examine and report upon the international standards pertaining to traditional knowledge and intellectual property.[63] Such defensive measures include documentation and the proposed expansion of the International Patent Classification (IPC)[64] to address traditional knowledge subject matter,[65] and patent disclosure requirements.[66] Of particular interest to this discussion, however, is the way in which these measures cooperate with the process of assimilation of traditional knowledge and the presumption of a common heritage with respect to its protection, while conventional intellectual property may be restricted and private.

Often the objective of protection is presumed to be the "safeguarding" or preservation of traditional knowledge, in the sense that it is vulnerable to loss, and yet this

[63] WIPO/GRTKF/IC/6/14 (14 April 2004).

[64] See also the documents of the Working Group on the IPC, which revised the International Patent Classification system in June 2003 to create a new category of information on traditional medicine, in particular, the medicinal use of plants. For a list of documents from this meeting, see http://www.wipo.int/classifications/en/ipc/w_groups/revision/9/index.htm

[65] WIPO/GRTKF/IC/6/8 (15 December 2003).

[66] WIPO/GRTKF/IC/6/9 (12 December 2003).

objective of preservation, together with the attempt to achieve this preservation through intellectual property systems, remain sources of confusion. The IGC itself addresses the common misunderstanding of the role of intellectual property as a means by which to safeguard traditional knowledge, as distinct from its operation as a regulatory system for the dissemination of works and their commercialisation.[67]

Furthermore, the objective of "safeguarding" knowledge is somewhat paternalistic, particularly when addressed through the reproduction of traditional knowledge within systems of documentation for the purposes of non-traditional scientific method and commercial exploitation, whether to defend it against misappropriation or to make it more available to commercial research and development.[68] The need for documentation in order to maintain cultures presumes an inability on the part of particular communities to maintain their traditional knowledge through traditional means, a presumption which is sometimes rejected by those communities whose knowledge is at stake.[69] This is not to underestimate the risk to cultural diversity through the loss of language and knowledge,[70] but to re-affirm the participation of local communities in the maintenance of culture and the need to facilitate community management and knowledge development according to traditional values and methods.[71]

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[67] WIPO/GRTKF/IC/6/3 (1 December 2003): 17.

[68] See the discussion of "indigenous knowledge" in the Science and Development Network, August 2002, http://www.scidev.net/dossiers/index.cfm?fuseaction=dossierfulltext&Dossier=7 See also Gervais (2003a).

[69] Sharma D (2002).

[70] See the discussion of this threat in Dutfield (1999): 103.

[71] See for instance, the Draft Report of the Ministry of Sustainable Resource Management, British Columbia, Canada, which aims to understand and characterise the potential importance of traditional knowledge to formal systems of sustainable development and biodiversity conservation: Butler & Menzies (2002).

In the context of these discussions, and in the context of the consideration of international standards and obligations considered in the Report of the Sixth Session,[72] the increased participation of communities, and the possibility of developments towards communal custodianship, must be addressed.

2.1 Participation and Community

The Sixth Session made notable progress towards the performance and participation of communities in the international negotiation of protection for traditional knowledge. The IGC document, "Participation of Indigenous and Local Communities,"[73] details various means by which to achieve effective involvement of communities in the current discussions. Among the various strategies, Member States are encouraged to include community representatives in national delegations as well as funding NGO representatives of communities, the direct financial support of community representatives or leaders of Indigenous or local communities of developing countries, cooperation with the United Nations Permanent Forum on Indigenous Issues, consultations and workshops, provision for submissions of accredited non-governmental organisations (NGOs) to the WIPO web site, specific briefings and consultations for NGO representatives, and ongoing consultation with representatives of Indigenous and local communities.

Despite the deferral to formalised NGO structures in developed countries, as distinct from the practice of some developing countries to use funds provided by WIPO to fund Indigenous or community leaders directly, the commitment towards Indigenous and local participation is significant in the context of international negotiations and

[72] WIPO/GRTKF/IC/6/14 (14 April 2004). See also WIPO/GRTKF/IC/6/6 (30 November 2003).

[73] WIPO/GRTKF/IC/6/10 (10 December 2003).

suggests a basis upon which to build respect and recognition for communities and customary management. Importantly, increased participation in this form is widely supported by the discussions and IGC, and the operation of a voluntary fund for Indigenous and traditional communities in order to achieve this has emerged as a preferred approach.[74]

2.2 The International Dimension

Of importance to arguments concerned with the commitment to intellectual property frameworks for protection, the Sixth Session considers the interaction of traditional knowledge protection with other areas of international law, including the environment, human rights, and cultural heritage.[75] Discussions note the potential to develop a binding international legal instrument, providing the important harmonisation of approaches to protection of traditional knowledge, although currently no consensus exists on this option. In the context of community capacity and authority in an international legal context, such an instrument would proceed towards the coherence and determinacy necessary to gain the consent of states to be bound, and thus achieve legitimate protection for community resources. The negotiation of an international instrument is advocated by Indigenous and traditional groups, concerned that intellectual property does not capture fully the interests at stake.[76]

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[74] See also the document from the 22nd Session (19-23 July 2004) of the UN Economic and Social Council (ECOSOC) Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, dealing with this issue. http://www.ohchr.org/english/issues/indigenous/docs/wgip22/8.pdf. The documents of the 22nd Session of the Working Group on Indigenous Populations are available from the Office of the United Nations High Commissioner for Human Rights, at http://www.ohchr.org/english/issues/indigenous/docs/documents22.htm

[75] WIPO/GRTKF/IC/6/6 (30 November 2003).

[76] For instance, the representative of the Sámi Council calls for such an instrument to include elements beyond traditional intellectual property, and for the IGC to cooperate with other UN bodies in this respect: Report of the Sixth Session, WIPO/GRTKF/IC/6/14 (14 April 2004): Paragraph 57.

3. The Seventh Session: Patenting Tradition?

Although at the time of writing, only limited preparatory documents were available, the Seventh Session is expected to emphasise intellectual property protection of traditional knowledge, particularly within the patent system. Discussions are likely to continue to develop defensive mechanisms of protection, particularly in terms of the documentation of traditional knowledge and the clarification of that knowledge as prior art. Importantly, however, the documents indicate an increased awareness of the potential conflict between traditional management of knowledge and documentation options:

> In some scenarios, defensive protection may actually undermine the interests of TK holders, particularly when this involves giving the public access to TK which is otherwise undisclosed, secret or inaccessible. In the absence of positive rights, public disclosure of TK may actually facilitate the unauthorized use of TK which the community wishes to protect.[77]

The outcome of discussions on issues of prior informed consent of traditional knowledge holders, and the impact of withholding some forms of traditional knowledge from disclosure on the protection of that material, will be of particular interest when the Seventh Session is staged in November 2004.

Future Protection: A Multi-Dimensional Approach

The Report of the Fifth Session shows the IGC's continued commitment to the possibility of some mechanism that will not only protect communal and traditional interests, but also allow for traditional management of resources and intellectual production in the context of trade. The Report of the Sixth Session continues this commitment to Indigenous and community participation, notwithstanding the ongoing

[77] See WIPO/GRTKF/IC/Q.5 (July 2004), Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System. See also the material for the Seventh Session on recognition of traditional knowledge within the patent system, in WIPO/GRTKF/IC/7/8 (23 July 2004).

characterisation of this participation within an intellectual property framework, a commitment which informs the preparatory documents of the forthcoming Seventh Session. While the solution continues to be emphasised as one for intellectual property law, the possibility of *sui generis* protection remains on the agenda, and the negotiation of an international agreement upon several platforms presents the most consistent and appropriate way by which to achieve this.

The relevant interactions towards achieving such a coherent response would include the United Nations Environment Programme (UNEP), the CBD, and biodiversity legislation; land rights; and human rights frameworks. The following chapters will consider the potential elements of an international agreement to be found in each of these areas, the limitations, and the necessary directions towards international authority for traditional and Indigenous communities. Before doing so, however, it is prudent to examine the potential for negotiating the intellectual property system as users, and this is the subject of the next chapter.

Chapter 5: The Tragedy of the Commons

> Capitalism has been increasingly privatising biological, and in fact all other, land and water resources. The privatisation has weakened and, for all practical purposes, destroyed the rural local community. The individual has thus to deal more and more directly with the centralising state and less and less with her/his neighbours. The state is so large compared to the local community that the individual's relationships with authority are getting more and more impersonal and based more and more strictly on blind laws rather than on understanding and compassion. This law recognises only individual rights and individual responsibilities. Whatever communal residue has remained from the old community days has, therefore, ended up without anyone with any recognised right to, or responsibility for, it. This means that there can be no one to be motivated, or to feel obliged, to care for it. Hence the aphorism: "The Tragedy of the Commons". This tragedy, therefore, emanates from the private, not from the communal.
>
> Tewolde Berhan Gebre Egziabher, General Manager, Environmental Protection Authority, Ethiopia.[1]

Introduction

In Chapter 2, the way in which intellectual property rights have been globalised as concerns of international trade by virtue of the TRIPS Agreement was considered. Individual intellectual property rights (and individual risk) can become objects of disputes between states, through access to the WTO dispute settlement procedures, particularly when considering especially powerful national industries and the global collective risk in those industries (music "piracy," pharmaceuticals, and so on). Chapter 2 suggested that the obvious or potential commercial value of traditional knowledge in the context of international trade almost imposes a moral obligation to trade upon one's knowledge. Certainly, to oppose the trade of information comprised

[1] Egziabher (2002): 1-2.

in this knowledge could be seen to be reactionary and in conflict with the dissemination of knowledge.[2]

Furthermore, such obligations betray a "commercial" relationship to knowledge as information to be traded, arguably in conflict with the "cultural" relationship to knowledge as intrinsic to community integrity, expressed by Indigenous and traditional groups. That is, the assumption is that information must be free as in freedom, not free as in beer.[3] But what is the nature of this freedom? What does it mean to apply free as in speech, free as in the free exchange of information, distilled from the knowledge embedded in community resources? What does this freedom imply about the information "traded" in this way?

The persistence of intellectual property frameworks suggests the possible importance of strategic adaptation of current laws, and indeed the potential for open access or open source models. The terms "open source" and "free software" derive from movements in the software industry towards non-proprietary licensing of software through general public licences (GPL), allowing the free distribution of source code to licensees, conditional upon the disclosure of any subsequent developments upon that source code through its use.[4] Significantly, this open access to information depends upon intellectual property laws in order to enforce the conditions of the licence. Other industries are also negotiating approaches to open access systems of knowledge

[2] Regarding the patent system, Dutfield (2003) argues:

> Nowadays, improving the system tends to imply strengthening the rights available. Increasingly, strong patent rights are regarded by governments as an essential component of national innovation policy for achieving the 'knowledge-economy'. So to take this line is to be pro-innovation and to oppose it is to be reactionary, neo-Luddite and even anti-capitalist. (208-209).

[3] Stallman (2001).

[4] A useful overview of the open source and free software movements, and the important distinctions between them, is available in Guadamuz González (2004): 331-339.

development, including biotechnology,[5] scientific research,[6] health and pharmaceutical research,[7] with one of the most significant historical examples of the relevance of open access systems being that of the Human Genome Project.[8]

Despite the interest in open source models of protection for traditional knowledge,[9] the fundamental pitfall, when applying the free/open source model, is the perceived persistence of a western emphasis on a particular standard of freedom of use and dissemination.[10] The nature of this "freedom" will be examined in this chapter. Crucially, this "freedom" is premised upon a coincident freedom of access, introducing critical concerns that will be explored further in the next chapter, in the context of biodiversity and genetic resources.

As considered in earlier chapters, the many examples of the removal of traditional knowledge by its privatisation through the creation of private intellectual property rights have led the international community, NGOs, scholars, and practitioners to identify a particular need to provide appropriate protection for traditional knowledge. It was seen in those discussions that intellectual property laws are not only implicated in the appropriation and privatisation of traditional knowledge, but are also drawn upon as the dominant mechanism by which to achieve a solution. Chapter 4 noted that the recent identification of this objective for protection has recently been described as

[5] Salleh (2003); Cooper (2004); Cukier (2003)

[6] The Royal Society (2003); Maurer (2003).

[7] Maurer SM et al (2004); Niman (2004); Niman (2004); An open-source shot in the arm? (2004). In particular, see the work of Tim Hubbard and James Love towards an international treaty on R & D, incorporating principles of open access: Hubbard & Love (2004); Love (2003); Love (2002).

[8] The Wellcome Trust Sanger Institute. (2003); An open source shot in the arm? (2004).

[9] Rossiter (2002). See also the spirited exchanges between participants in the SARAI Commons Law Online Discussion Forum, archived at http://mail.sarai.net/pipermail/reader-list/2004-January/003375.html.

[10] See the discussions at http://mail.sarai.net/pipermail/reader-list/2004-January/003375.html

urgent by WIPO and the ways by which to achieve that protection form the subject of the current international discussions within the IGC, discussed in that chapter. Recently, the mandate of the IGC, was extended to accelerate the resolution of protection without any limits upon the means by which to achieve this, including the possibility of an international instrument or instruments.[11] However, as contended in Chapter 2 and reviewed in Chapter 3, relevant protection of traditional knowledge arguably cannot be achieved through the individual, competitive rights created by intellectual property laws.

The major concern remains, however, that because of the potential international commercial value of traditional knowledge and the globalisation of intellectual property rights, discussions have proceeded on this platform of international trade in goods comprising intellectual property rights, and therefore upon a proprietary model of knowledge. Furthermore, any attempt to arrive at a system of protection that will be implemented on an international basis will be forced to be acceptable to the major expropriators of traditional knowledge – arguably the problem in the first place. This raises the question of whether movements towards the creative commons[12] and genetic commons,[13] as well as open source[14] and open access[15] models, might present

[11] WIPO. Press Release 378/2004, "WIPO Member States Lay Foundations for Protection of Traditional Knowledge," published 19 March 2004.

[12] Creative Commons can be found at http://creativecommons.org. See also the Cultural Commons at www.culturalcommons.org. The use of "culture" suggests a move away from individual creativity and towards civil society, but nevertheless inadvertently maintains the emphasis on information as culture "legitimated" through its vulnerability to intellectual property laws.

[13] The treaty initiative to share the genetic commons was launched in February 2002, in Porto Alegre. Version 8 of the Draft Treaty and petition can be found at http://www.foet.org/Treaty.htm. Activity on this initiative has ceased since late 2002, however the term retains its currency. See also the proposal to launch a Science Commons at http://creativecommons.org/projects/science/proposal.

[14] See the open source site at www.opensource.org. See also the Free Software Foundation at http://www.gnu.org/

[15] This term is usually used in the context of publishing. See the Bethesda Statement on Open Access Publishing, 20 June 2003. See also the use of the term in the context of traditional agricultural practices

potential mechanisms by which to appropriate intellectual property models for traditional knowledge protection, or at least indicate certain principles that may be relevant.

The major concern is that arguments for freedom of expression present a significant objection to efforts to protect traditional knowledge: namely, the charge that excluding certain uses of or access to that knowledge is a control and therefore a denial of the freedom of expression. How this freedom (understood as access) might be relevant to or indeed impact upon traditional knowledge protection (where exclusion may be necessary) is a critical aspect of the applicability or adaptability of open access models. In particular, the way in which access to traditional knowledge by those outside the community may indeed translate as control, through the offence to knowledge and community, and through transformation of that knowledge through that use, must be problematised in the context of "freedom."

Tradition

In earlier chapters, the potential damage caused by framing the subject matter of protection according to "tradition" was considered. As explained in the introduction to this work, the term traditional knowledge introduces some complex problems, which will not be repeated here, but it is useful to note the concerns of some commentators regarding the potential division of knowledge and of knowledge-holders into traditional and non-traditional groups.[16] To reiterate briefly, traditional expression within community includes the responsibility to the narration of tradition, the

in FAO Focus: Plant Genetic Resources and Food Security. "Access to Plant Genetic Resources and the Equitable Sharing of Benefits: a contribution to the debate on systems for the exchange of germplasm" 1996. The next chapter will further this consideration of "open access" in the context of the CBD and the understanding of natural resources as part of the common heritage of humankind, to be balanced against the interests of national sovereignty (therefore making "community" a mere witness to the contract).

[16] Leach (2003): 4-5.

expression of which may evolve with the contemporary community. Nevertheless, that expression does not occur as a self-conscious innovation upon or derivation from what has gone before, in the same sense of western "progress" and linear models of innovation. Further, the cohesion and cultural integrity of a particular group may be celebrated in the particular instance of cultural production, rather than the innovation of the individual. As discussed and defended earlier, in this work itself, the model departs from analysis of the categories of traditional knowledge in order to emphasise the cultural process of creativity rather than universalise the knowledge of Indigenous and traditional groups as objects of international trade. Introduced earlier, the term community resources is favoured in that it presents cultural diversity and process as the subject matter of protection. Furthermore, the term emphasises "resources" of the community, the value being realised through dynamic cultural processes in relation to those resources, rather than the creation of individual ownership with respect to an object of intellectual production.

This chapter will consider the operation of open access strategies in relation to the object of "traditional knowledge." Despite the potential in these strategies, ultimately and necessarily they continue to deal with knowledge artifacts as the subject matter of exchange, dissemination, and development. While the incremental and evolutionary models of development share aspects with knowledge development in traditional and Indigenous communities, ultimately the strategies described here do not achieve the same relationship to the "freedom" of knowledge. The freedom to access knowledge in the models considered in this chapter is quite distinct from the freedom to conserve knowledge that is perhaps a greater concern for Indigenous and traditional groups.

Freedom

> If nothing is more common today than demanding or defending freedom in the spheres of morality, law, or politics – to such an extent that "equality," "fraternity," and "community" have demonstrably and firmly been pushed, if at times regrettably, into the background of preoccupations and imperatives, or have finally even been considered as antonyms of freedom – then nothing is less articulated or problematized, in turn, than the nature and stakes of what we call "freedom."[17]

As mentioned, the open source / access models are founded upon a notion of freedom, the duties of that freedom being towards maintaining the freedom itself (disclosure of the new information proliferated through sharing). In other words, while the freedom to access the software is a freedom from constraints against that access (negative freedom) the duty is to maintain that access (through the disclosure of the source code of any developments upon the information that was the original object of access). The evangelical and moralising rhetoric[18] of the Free Software Foundation, for instance, betrays its reliance upon the neo-liberal sovereignty of free will and the idealism of individual human rights.[19] Thus, to speak against the "freedom" is almost amoral and certainly illegitimate.[20] Nevertheless, the "freedom" of access is expressed as a "freedom" from monopolistic ownerships and control, and therefore free access to that information towards (the freedom of) expression. This aspect is a critical concern for efforts to protect traditional knowledge: namely, the charge that excluding certain

[17] Nancy (1993b): 1.

[18] Guadamuz González identifies contradictions in the "freedom" exalted in the free software movement, and suggests that the nature of their licences paradoxically impinges upon the freedoms of those seeking to commercialise their developments. This is a useful parallel to the need to give effect to genuine community access to the commercialisation of traditional knowledge as well as its protection: Guadamuz González (2004): 331-339.

[19] Considering Hobbes' theory of liberalism and modern natural rights, Douzinas notes that "when human nature becomes sovereign and unfettered, it needs as its counterpoint a public power which shares in all particulars the characteristics of the undivided and singular free will of the individual and literalises his metaphorical unlimited power": Douzinas (2000): 20.

[20] Drawing upon notions of "freedom of speech" as constitutionally sanctioned rights in the United States, the Free Software Foundation declares its legitimacy as a legally-endorsed movement. As Douzinas suggests, one cannot "opt out" of morals: Douzinas (2000): 240.

uses of or access to that knowledge is a control and therefore a denial of the freedom of expression.

1. Intellectual Property and Identity

Previous discussions have examined the way in which conventional western discourses of identity almost invariably invoke notions of self-expression and individual control of "ownership" of that expression, and the resources necessary to display that identity.[21] Earlier discussions have also examined the way in which intellectual property, in the context of its conceptualisation and harmonisation within the framework of international trade, is increasingly concerned with the status of the owner, rather than creativity or innovation. This relationship sustains the possessive connection to creativity that not only undermines communal analyses, but also threatens efforts to re-think access to resources and open solutions to innovation.

One of the major problems of this adherence to possessory models of identity, for traditional knowledge, and where it departs significantly from other objections (such as open source models which draw upon the language of freedom and access) is that community models of protection call for restrictions on that access, often based upon the free and prior informed consent of communities. The justifications for restrictions to access and restrictions to freedoms (of speech and self-expression), become particularly difficult to sustain if the "identity" of community is premised upon the possessory relationship to resources.[22] Communal custodianship and subjectivity, on the other hand, is not a simple opposition to this individual model of self; to do so would simply formalise and individualise community as a collective, yet nevertheless

[21] Chapter 2 introduced the relationship between identity and ownership of resources. See also Strathern (1999): 134. Chapter 2 also noted the acknowledged the departure in feminist critical theory and identity politics from these dominant approaches to identity: Butler (1990); Cornell D (2000).

[22] For a discussion of the problems with adherence to this link in the context of Australian native title rights see Povinelli (2002): 41-42.

possessive, self. In traditional and Indigenous philosophies of communalism, individual subjectivity is premised upon community and indeed the being of personhood is impossible without community.[23]

This shares much with the ecological philosophy of Félix Guattari, considered in earlier chapters, where individual subjectivity is based upon collective expression, as always already prior to the production of that subjectivity. However, as Jean-Luc Nancy suggests, community has been pushed into the background by the preoccupation with individualistic freedoms. This is particularly apparent in the context of discussions towards traditional knowledge protection and indeed in recent analyses of community as contrary to individual freedom and expression.[24]

2. Possessing freedom, possessing identity

Language and expression through language, therefore, constitutes the means by which identity is constructed, and by which that identity is recognised (and recognisable) by others.[25] Therefore, the misappropriation of language constitutes identities of mis-recognition.[26] Presented as a fundamentally individual right to self-expression within the possessory models of identity discussed above, freedom of expression suggests a proprietary-like relationship to that speech or expression, and implies a control over

[23] For instance, see the declarations in the Indigenous Peoples' Statement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the WTO Agreement. "No to Patenting of Life!" (1999). See also Gyekye (1995): 161. Compare Bauman's criticism of community, which was discussed in Chapter 1, as simply an antidote to instability and insecurity: Bauman (2004): 61-62; and as "missing freedom": Bauman (2001a): 4.

[24] Bauman (2001a).

[25] Judith Butler describes the way in which language is ascribed a certain agency, and identity (and recognition of that identity by others) is premised upon the prerequisite of language (and speech): Butler (1997): particularly 1-13.

[26] Butler (1997) explains, "One 'exists' not only by virtue of being recognized, but, in a prior sense, by being recognizable" (5).

one's expression reminiscent of that at work in intellectual property models.[27] Indeed, the individual right to freedom of expression implies an author of that expression, the source, the identity to pursue and assert those rights:

> Freedom of expression focuses on the individual author as citizen, while copyright focuses on the individual author as commodity producer, but neither category of individual could exist without the nation-state and its association with colonial economic expansion as the primary focus of allegiance and/or opposition … Without copyright to protect the expression of ideas and information in the marketplace, authorship would be much less significant and freedom of expression would not necessarily have developed as an individual right of citizenship.[28]

Therefore, "freedom" may be appropriated by the ideology of personal control and free will, in order to coerce the pursuit of that control over information, disguised as self-expression: "The idealization of the speech act as a sovereign action (whether positive or negative) appears linked with the idealization of sovereign state power or, rather, with the imagined and forceful voice of that power."[29] Absolute freedom, should such a thing exist, would make the individual subjectivity implied by such control paradoxically impossible, in that it would render impossible the community relations which, as discussed, are the foundation of that individual subjectivity.[30] At the same time, absolute freedom, where freedom is understood in this way as a right, similarly threatens western systems of control and socialisation. Douzinas suggests that it is the rhetoric of absolute and unlimited rights that actually necessitates the

[27] For instance, see the equation of intellectual property rights and freedom of expression in the WIPO Forum on Creativity and Inventions – A Better Future for Humanity in the 21st Century, October 2000, WIPO/IP/HEL/00/17 (2000), where intellectual property is endorsed as promoting freedom.

[28] Wright (2001): 116.

[29] Butler (1997): 82.

[30] Guattari (1995b): 207. This notion of the collective foundation for personhood and the subjectivity of the individual occurs through Indigenous philosophies.

introduction of new legally-sanctioned means of control, ironically in order to guarantee those "freedoms."[31]

Thus, intellectual property laws are proclaimed as the "freedom" to exploit the products of one's creativity[32] and are justified as encouraging creativity and, by default, the pursuit (and the freedom) of self-expression.[33]

> Take copyright for example. Thirty years ago, the then Register of Copyright in the United States, Barbara Ringer observed that copyright protection in the United Kingdom and the United States took publishing out of the hands of the government or monarch and placed in the hands of authors and publishers - thus ensuring freedom of expression:
>
> > [Copyright protection gives authors freedom] to write and live by writing if they can manage to command the attention of a large enough segment of the populace to make the dissemination of their works even marginally profitable.[34]

Thus, increasingly strong intellectual property protection is justified as encouraging innovators to disclose their creations with confidence, thereby promoting a confidence in (the freedom of) expression.[35]

Similarly, it is suggested that the right to freedom of expression, as it is legally emancipated, is tempered by necessary duties to the other in society.[36] Indeed without these limits, freedom is unimaginable and meaningless:

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[31] Douzinas (2000): 244-45.

[32] Hamilton (1999): 9-12. See also the discussion of this argument, as well as a consideration of the privacy of information and the counter of dissemination as encouraged through intellectual property protection of ideas in information, in Cohen JE (2001).

[33] This is related to the discussion in Chapter 2, of intellectual property as the grand narrative of culture and creativity/innovation. There are resonances with Lyotard's notion of the grand narrative of emancipation through the dissemination of knowledge: Lyotard (1984): 31-32.

[34] WIPO/IP/HEL/00/17 (2000): 6.

[35] For instance, the Australian Government discourages individuals from disclosing their ideas until they have intellectual property protection: "Fail to do so and you may put your business at risk. Do not talk about your idea or make it public too soon, or you may lose the legal right to exclusive use of your IP." IP Australia. http://www.ipaustralia.gov.au/ip/introduction.shtml

[36] An example of this would be the adversarial relations between media freedoms and defamation, right to privacy, and censorship laws: Douzinas (2000): 245. Similarly, it could be argued that freedom is

> Freedom cannot be presented as the autonomy of a subjectivity in charge of itself and of its decisions, evolving freely and in perfect independence from every obstacle. What would such an independence mean, if not the impossibility in principle of entering into the slightest relation – and therefore of exercising the slightest freedom?[37]

These limits are explained in Nancy's conceptualisation of freedom as shared and constitutive of community. Contrary to the construction of freedom as a right to be pursued and asserted,[38] freedom must be the basis for ownership rather than motivated by it. As Nancy explains:

> *Freedom as the "self" of the being-outside-of-itself does not return to or belong to itself.* Generally speaking, freedom can in no way take the form of a property, since it is only from freedom that there can be appropriation of anything – even of "oneself," if this has any meaning.[39]

However, as discussed, increasingly a possessive rhetorical relationship to freedom is implied in the discourse surrounding the freedoms of speech or expression. The nature of the accompanying duties of the social contract may indeed be irrelevant to traditional and Indigenous communities. Of greater concern, however, is the way in which the freedom to pursue one's rights has increasingly departed from the notion of attending duties in an ethical context:

> The often heard claim that the exercise of freedom carries responsibilities is a piece of unrealistic moralism. Freedom and rights carry no inherent limitations

constrained by the market, effecting censorship through the operation of dominant media ownership: Note however, the increasing autonomy of this freedom as absolute, in the case of the US government reaction to genocide in Rwanda. NGOs requested the government to intervene in broadcasts by a radio station that was inciting genocide. However, the US State Department asserted that "the traditional American commitment to freedom of speech was more important than disrupting the voice of genocide": Forges (1999): 641. See the discussion in Douzinas (2000) 133.

[37] Nancy (1993b): 66.

[38] See the discussion of the relational exercise of human rights in Douzinas (2000): 343.

[39] Nancy (1993b): 70. Rejecting the proprietary-like character of the rhetoric surrounding freedom of expression, Wright (2001) explains: "Freedom of expression is not something which can be possessed or 'owned' but is rather a process of communication in which an ethical redistribution of power is necessary before real 'freedom' of the wide variety of human 'expression' will be possible ... Recasting discussions over freedom of expression in this way looks strange but this is because human rights are so deeply imbued with Enlightenment values, notions of individualism and the values of a print-based culture that is extremely difficult to see what else 'expression' might mean" (133).

> or moral duties; the only defence against their side-effects is to create even more rights and legal protections, increasing legislation endlessly and making conflict the endemic and inescapable condition of the social bond. When rights justify every claim and sanctify every desire nothing has much value any longer.[40]

What impact, therefore, does this understanding of individual human freedoms have upon the freedom of a community?

3. Knowledge, Expression, Agency

> Communalism may be defined as the doctrine that the group (that is, the society) constitutes the focus of the activities of the individual members of the society. The doctrine places emphasis on the activity and success of the wider society rather than, though not necessarily at the expense of, or to the detriment of, the individual.[41]

The compartmentalisation of knowledge as objects of information, language, code, and inventiveness, ascribes an agency to those objects. Restricting access to that information is, in effect, to interfere with one's freedoms. Language, codes, images, information must be free.[42] Thus, objects in which intellectual property can be found are the performance of the social, the agents of freedom. The objects of information comprise the language, the "speech," in an international economy of trade in those objects. Ushered in, then, are the arguments on another ethical or political level, that interference with access to the information in traditional knowledge is interference with the legitimate citizen's freedom of expression.[43] Is the community illegitimate, therefore, that its place in this moral hierarchy goes unnoticed?

Where misappropriation interferes with the expression and freedoms of the traditional community, might this not justify the exclusions sought to realise the concept of

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[40] Douzinas (2000): 245.

[41] Gyeke (1995): 154-55.

[42] See for instance, the rhetoric of the World Wide Conferencing Network, "Information Must Be Free!" http://www.wwcn.org/~grit/free/

[43] See Lyotard's discussion of the effect of the loss of speech: Lyotard (1993a): 145. See also the discussion of Lyotard's theory of human rights in Douzinas (2000): particularly pp 173-74.

community resources? The agency ascribed to the information, the "speech-objects" of international trade, cannot be so readily used to position and script traditional knowledge. Within the system proposed in this work, traditional knowledge is but an element of the concept of community resources. To script protection according to the objectification of traditional knowledge would thus do violence to community. If traditional knowledge is pre-scribed in this way, it remains vulnerable to exploitation because it continues to be constituted within the language of property and international trade. The interpellative power of intellectual property language renders traditional knowledge "free" and, as information in the modern "knowledge society," almost ethically obliged to be exchanged.

Granting access to traditional knowledge, through the intellectual property style regulation of disclosure of origin, remuneration, or the open source systems of ongoing collaboration, will nevertheless compromise the "freedoms" of Indigenous and traditional communities. Registering and recognising traditional knowledge through systems regulated in this way translates the traditional knowledge, exhausts its cultural integrity and meaning, and interpellates the community in the language of the industrialised world. This is quite different from a system which responds to relations between "communities," and incorporates customary law in order to regulate access and dissemination. It is important, therefore, that the system developed in this work resists this potentially "imperialist" project of traditional knowledge definition and documentation, instead locating, specifying, and siting culture in the community.

4. Freedom of Expression

> The orator who speaks the truth to those who cannot accept his truth, for instance, and who may be exiled, or punished in some way, is *free* to keep silent.

Michel Foucault[44]

Article 19 of the International Covenant on Civil and Political Rights prescribes that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or, through any other media of his choice.

The freedom suggests not only the expression of ideas, but also the access to information and ideas, and the means by which to develop and make that expression.

In the Universal Declaration of Human Rights (UDHR), the freedom is set out in Article 27:

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits;
>
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The right to access information in paragraph 1 is tempered by the right to protect the moral and material interests of creativity in paragraph 2, and as found in intellectual property law. The possible conflict between these two paragraphs is the key to the relationship between freedom of expression and the protection of traditional knowledge and expressions. Indeed, the WIPO IGC has identified the need for this balance between the protection of cultural identity and freedom of expression.[45]

Referring to the freedom of expression and creativity, advocates of access arguably underestimate the potential for harm to the identity of community through the inappropriate use or re-presentation of traditional knowledge. The appropriation of not only actual objects of traditional knowledge information, but also the trace of that

[44] Foucault (2001): 19.

[45] See in particular from the Third Session, WIPO/GRTKF/IC/3/10 (25 March 2002): Annex 1: 13

knowledge (through artistic method, for example), is at best copying, and at worst impersonating and attempting to speak for the community. In balancing the freedom of expression of those seeking access to traditional knowledge, it is surely necessary also to consider the freedom of expression of Indigenous and traditional communities. Given that the WIPO IGC has indeed identified the need to balance freedom of expression of non-Indigenous or non-traditional individuals when devising traditional knowledge protection, it seems appropriate to balance the freedom of expression of community as well, as per Article 27(2) of the UDHR. This rhetoric of a balance when it comes to the realisation of the freedom of expression defeats arguments for unfettered access to material based upon this access to expression, including those put forward by the open source and free software movements. As Rosemary Coombe explains, it is necessary to reject:

> any vision of democracy which poses complete freedom of speech and full access to all cultural forms as the only response to corporate possession of culture, broadly defined. Absolute rights of private property and absolute rights of access to the public domain entertain only extreme points of a Eurocentric spectrum of possibility that needs to be challenged by the cultural mores of others. Peoples have other relationships to cultural forms – trust, secrecy, guardianship, stewardship, initiation, sacralization – and obligations to relatives, ancestors, spirits, and future generations which makes models of access and ownership appear extremely impoverished. Such knowledge is not adequately understood as information, nor may its circulation be properly understood as speech.[46]

Indeed, this suggests that the very notion of "balance" itself may be problematic, suggesting an either/or or total account of the issues at stake, when perhaps it is not possible to reconcile everything within the relationship between traditional knowledge and intellectual property. Recalling the consideration of ownership and the

[46] Coombe (1998a): 208.

knowledge/information relationship in earlier chapters, the relationship between knowledge and such "freedoms" becomes clearer.

Appropriation of the knowledge of the community, without the necessary consent of the community whose knowledge is at stake, risks the exhaustion of the means of communication for that community, through the reduction of that knowledge to mere information in trade. The integrity of their traditional knowledge is critical for communities as a fundamental means of communication within community and of expression of self. Access to that knowledge forms the very basis of freedom of speech or expression on the part of communities. With the transformation of knowledge through misappropriation and offensive use comes the loss of communication, the loss of belonging, and the fracturing of community to silence. Knowledge renders the community present and accountable, while its commodification as information simplifies and generalises the community, ultimately deferring it as yet another artifact of "traditional knowledge."

Furthermore, and importantly, the argument for freedom of expression on the part of communities, and restriction of access to their traditional knowledge, is often misinterpreted in a fundamental way. This is chiefly because of the rhetorical strategy underlying the use of the term, "freedom of expression." For instance, the Salman Rushdie affair may be cited as an argument against the kinds of exclusions proposed for traditional knowledge protection, where those exclusions are interpreted as an affront to free speech.[47] However, the publication of *Satanic Verses*,[48] as interesting as this event in literary (and indeed political) history may be, is not a useful example

[47] For a discussion of the publication of *Satanic Verses* and freedom of speech and expression, see MacDonough (1993); Lee (1990).

[48] Rushdie S (1988).

of the misappropriation of community resources. It may be interpreted as a political commentary on a religious system, but not an appropriation and transformation of the system, nor a copying or impersonation. The Koran is revealed and is presented for consumption in this way, and, as a response, *Satanic Verses* presupposes the identity of the community towards which it speaks, rather than interpellating and impersonating it. It does not speak aside, adapt, transform, and appropriate:

> [U]sing the same term (freedom of expression) to describe such diverse situations as pornography, the Salman Rushdie affair and the marches of National Front supporters through ethnic minority communities, helps only obscure the totally different considerations and conflicts involved in each instance under the formally identical but meaninglessly vague term.[49]

Thus, non-Indigenous or non-traditional utilisation of methods of Indigenous Australian dot-painting in modern art, for example, is an incomparable problem. It is problematic to suggest the community management of its knowledge resources may be summarised as an aspect of freedom of expression, without considering the problematic way in which this term has been deployed.

Chapter 2 introduced the notion of intellectual property as the "objective" grand narrative of Culture. As "objective," intellectual property is without subjectivity: "The objects of communication, the "written-to" and the "written-about," are passive."[50] The right to freedom of expression presumes the literacy and control with which to render these objects tools in that expression, and subjugates means of expression which do not make that identification of personhood, of authorship, of creatorship, possible – namely, freedom of expression presumes a western individualistic notion of, and relationship to, that expression:

[49] Douzinas (2000): 253.

[50] Wright (2001): 127.

> This notion of individuality, and the quality or standard of humanness which is associated with it, could not exist in cultures which rely largely on speech rather than writing, or indeed on manuscript rather than printing. Freedom of expression is in many ways the quintessential human right and is rightly given precedence within Western discourse as a result. But this is so only because of the specific content of Western societies as the domain of the literate individual, a situation that has developed only very recently.[51]

Community

Speaking generally, the management and utilisation of traditional knowledge must generally occur on a communal basis and in a global context, rather than being made a matter of national sovereignty. Indeed, the traditional group is not necessarily conceivable by reference to a nation-state, where in fact groups may overlap national boundaries. Similarly, virtual on-line communities also resist this linear model of regulation. For such communities, global relationships and the obligations to a global "civil" community, as it were, are the most relevant and meaningful.

However, the common misconception of "communal" with respect to Indigenous and traditional groups, and the reason for the major reservations to be exercised with respect to the application of free/open source schemes in this context, is the inaccurate use of "communal" to mean shared amongst all members. As was considered in Chapter 1, most discussions assume that ownership in traditional communities is communal in this sense, rather than in the complex way in which communalism is applied in Indigenous philosophies.[52] While this is often appropriate, it was noted that it is perhaps more critical to understand the complex differentiation within communities, and that custodianship of particular knowledge may be communal or individual. It is critical to reiterate here, in the context of software communities and collaborative models, that traditional knowledge is not necessarily held by all

[51] Wright (2001): 127-28.

[52] See the more detailed discussion in Chapter 1.

members within a particular community. Furthermore, it is not necessarily accessible by all members of a particular community. Throughout the previous chapters, the notion of "communal ownership" has been problematised in order to maintain the critical application of "community" as distinct from an undifferentiated "collective" self: "Communities are internally differentiated to quite a high degree, and their members should not be seen as interchangeable units."[53] Therefore, in the Indigenous or traditional community, knowledge will be held by one or by several in accordance with the values of the community:

> The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.[54]

The custodianship of knowledge, or the access to that knowledge within a community, may or may not be communal, but the regulation of that ownership is communal in that it is undertaken according to values shared by the community.[55] On the other hand, the regulation of intellectual property models is undertaken externally. Therefore, an appropriate model may be one that vests the authority for management and regulation of ownership of traditional knowledge in the community. As discussed, many Indigenous and traditional groups call for *sui generis* systems to recognise community relationships to their resources. Indeed, as the discussion has shown, the subject matter of protection is not the "work" in and of itself, but the relationship

[53] Maddock (1998): 9. Fleur Johns (1994) cites Eric Michaels as arguing that the simple binary relationship of individual versus collective represents "some phony appeal to the primitive, or to a recently manufactured tradition" (178).

[54] Indigenous artist, Bulun Bulun, quoted in Golvan (1989): 348.

[55] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

between community and its resources, and the freedom to continue to use and develop those resources in a traditional way.

1. The Free Community

Understanding the fundamental concerns raised by an unreflective assertion of "freedom," the free/open source models are not necessarily the same "object" of community, relying above all on an ongoing assertion of individual freedom. Nevertheless, these models do suggest certain commonalities with traditional and Indigenous communities, with respect to the overall development of innovation and creativity as a de-centred, collaborative, and incremental progress. That is, open source models move away from the processes of origination with which intellectual property systems remain preoccupied (however, the in-imitativeness of the ultimate object of information necessarily persists).

In ways similar to that seen in traditional and Indigenous communities, development of knowledge in the open source context involves the recognition by and return to the community as creativity's reward. Property, in the conventional sense, would pose a significant obstacle to ongoing creativity according to this model. It is this incremental and shared process of developing knowledge which unseats the "singularity" of creativity presupposed by intellectual property protections. Strategically, free and open source models rely upon this presumption of origin in order to enforce compliance with the shared values of knowledge development. In this regard at least, the free and open source models affirm "community" in ways usefully compatible with the enforcement of customary law within traditional and Indigenous communities.

While the previous discussion has problematised the free/open source model in terms of the absolute freedom of information, which may not necessarily be appropriate to traditional knowledge, clearly the model may have applications in other aspects of community capacity-building and remain of some relevance to the system of community resources. For instance, in the context of the transfer of technology, food security, medicinal, and agricultural security and practice, there are some useful principles that may be adapted. Similarly, where conditions of the community's free and prior informed consent have been fulfilled, the products of medical and pharmaceutical research based upon traditional knowledge, as one example, may be required by agreements with the communities involved to be disseminated (shared) according to open source or open access models.

Finally, as considered in earlier discussions of tradition and innovation, the incremental and evolutionary way in which knowledge is developed according to traditional and Indigenous community systems is not necessarily recognised as such by the conventional models of creativity and progress in knowledge. Those "minor" advances are not necessarily registrable, recognisable, or "visible," according to conventional intellectual property criteria:

> For there to be creativity, there has to be a recognition that something has happened, or that a novel entity has come into being. And flows are also dependent upon recognition. In other words, a register for effect is required. The register we have available is reward through IP law. But we need to be able to include other registers in order to facilitate more productive and equitable flows. I suggest that an aspect of this is in the understanding and the recognition of other modes of creativity.[56]

For instance, originality in copyright, novelty and inventiveness for the purposes of patentability, and so on, are arguably unsuitable and artificial criteria to impose upon

[56] Leach (2003): 2.

traditional knowledge in order to make it assimilable within intellectual property law. Furthermore, these criteria simplify the creative process in order to facilitate the priority of the object in this system for the purposes of ownership regimes to apply.[57] Nonetheless, it is possible that free/open source software models of modifying intellectual property, for the purposes of this particular scheme of creativity, might present the necessary link for traditional knowledge to "register" within intellectual property.

Open Developments

1. Open Source Systems and Development

In July 2003, practitioners of open source systems from Asia, Africa, Europe, and Latin America, produced the "Manifesto on the role of Open Source Software for Development Cooperation."[58] In that Manifesto, the authors claim that the essential principles of development cooperation, namely "good governance" and "local ownership," are found in non-proprietary software development, or the FLOSS approach (Free/Libre/Open Source Software): "This means that FLOSS provides tools that are in line with the goals and intentions of development cooperation projects." [59]

In a presentation to the WIPO International Conference on Electronic Commerce and Intellectual Property, staged in Geneva, 19-21 September 2001, Anil K Gupta,[60] made the following observations:

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[57] Leach (2003): 2.

[58] Waag Society. Manifesto on the role of Open Source Software for Development Cooperation. 25 June 2003. http://sarai.waag.org/display.php?id=28. For information on Waag Society, visit http://sarai.waag.org/display.php?id=13

[59] Waag Society. Manifesto on the role of Open Source Software for Development Cooperation. 25 June 2003. http://sarai.waag.org/display.php?id=28

[60] Kasturbhai Lalbhai Chair in Entrepreneurship, Indian Institute of Management, Vastrapur, Ahmedabad; Co-ordinator, SRISTI and Honey Bee Network; and Executive Vice Chair, National Innovation Foundation.

> A geo referenced database of innovations protected for varying durations depending upon the system which is agreed upon among the parties through an international treaty will go a long way in promoting the cause of IP at grassroots. We must at the same time, appreciate that the open source movement has generated many useful concepts of general purpose license. If a small farmer uses a technology described in the international register (INSTAR) for one's own use and livelihood, normally there should be no objection to that. However, if an individual or a company tries to generate commercial benefit from the innovation then it should not be allowed without proper authorisation. Many times, the critics of IP system forget one of the most important goals of such a registry. This is to encourage the cross-pollination and lateral learning as having been the basis of the Honey bee Network. In the absence of such a registry while corporations might benefit by individually gaining access to local knowledge systems, the transaction cost of the communities would be enormous to overcome the barriers of language, literacy and localism ... The globalization process which strengthens the options of local communities is a change that is urgently warranted.[61]

At a UNESCO Ministerial Round Table Meeting, staged 9-10 October 2003, ministers from around the world issued a Communiqué[62] which set forth principles pertaining to knowledge societies and human development, in preparation for the World Summit on the Information Society (WSIS) launched in Geneva in December 2003, with the second phase to be staged in Tunis, in November 2005.

The Communiqué maintains the fundamental value of access to information in facilitating individual, community and national development, and declares the importance of knowledge societies as fundamental to principles of equitable and democratic global community:

> Knowledge societies are about capabilities to identify, produce, process, transform, disseminate and use information to build and apply knowledge for human development. They require an empowering social vision which encompasses plurality, inclusion, solidarity and participation.

And further:

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[61] Gupta (2001): 14-15.

[62] Communiqué. Ministerial Round Table on "Towards Knowledge Societies." UNESCO Headquarters, 9-10 October 2003. Note also the response to the WSIS Declaration of Principles by Civil Society, which emphasises a basis of human rights as distinct from a basis in the dissemination of information, which is claimed to form the foundations for the WSIS document. See Gross (2003).

> Building knowledge societies implies a commitment to the principles of democracy, transparency, accountability and good governance. This process must engage, and recognize the interdependency of, governments, the private sector and civil society. Lack of access to knowledge engenders marginalized and disadvantaged populations and hinders the participation of these populations in decision-making and the development process.

In doing so, the Communiqué establishes the following set of principles of knowledge societies:

- Freedom of expression
- Universal access to information and knowledge
- Respect for human dignity and cultural and linguistic diversity
- Quality education for all
- Investment in science and technology
- Understanding and inclusion of indigenous knowledge systems.[63]

In the Draft Action Plan[64] of the World Summit on the Information Society, the importance of the balance between private intellectual property rights and the rights of users (the public interest) was emphasised, including in the context of traditional knowledge protection, and the facilitation of that protection through information and communication technology:

> Protection against unfair use of indigenous knowledge should be strengthened/Use of appropriate technology shall be promoted to share personal scientific knowledge and pre-prints and reprints written by scientific

[63] Communiqué. Ministerial Round Table on "Towards Knowledge Societies." UNESCO Headquarters, 9-10 October 2003.

[64] WSIS, Draft Action Plan, 20 June 2003. These principles are also found in the Reference Document: WSIS, Reference Document, 12 June 2003. WSIS/PCIP/DT/3-E.

> authors who have waived their rights to payment/Appropriate measures to protect against unfair use of Traditional Knowledge could be explored.[65]

Thus, information and communication technologies are critical to the effective digitisation and documentation of traditional knowledge as a defensive measure, and the principles of FLOSS in the most general sense of sharing and dissemination of knowledge are useful also as a defensive means by which to ensure ongoing access by local communities. But can the model offer anything more concrete to the achievement of international instruments of protection for traditional knowledge?

Of particular concern is the rendering of knowledge as information to be exchanged freely, and to which unfettered access is to be granted. Yet the ambition is to achieve this with respect to cultural diversity. The free/open source models risk the same simplification (as information) of the relationship between community and knowledge/resources that has been traced throughout the efforts to protect community resources through intellectual property. Where promise may lie, however, is in the facilitation of collaborative, incremental, and evolutionary models of development which, to a certain extent, share resonances with traditional knowledge models. This may not translate effectively as protection for traditional knowledge. However, to the benefit of traditional and Indigenous communities, and to developing countries, these principles diversify approaches to protection and knowledge development more generally and in ways relevant to communities, as shown in the examples below.

2. Scientific Collaboration Model – Distributed Innovation

The model of distributed collaboration and research bases is recognised as especially important in academic and scientific research.[66] In the usual practice of such

[65] WSIS, Draft Action Plan (2003). See also the Civil Society Declaration to the World Summit on the Information Society, "Shaping Information Societies for Human Needs," 8 December 2003. Emphasis in original document.

collaborative innovation, however, "communities promoting 'collaborative' effort conceal their own lines of exploitation."[67] The importance of intellectual property law to these kinds of models is the identification of sites of innovation, of "originality:"

> If we are living in a 'knowledge-based economy,' then such social/collective formations, and their severance, are crucial to the innovations on which the market depends. We should be thinking not of individual rights as against collective rights, but of different kinds of collectives.[68]

Therefore, in ways similar to the development of free software and open source movements, the objective of open access models in collaborative and distributed research is to strive to negotiate intellectual property laws in order to ensure ongoing access.

The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities[69] sets forth principles of collaborative scientific research based upon conditions of open access to knowledge as a means by which to ensure ongoing innovation at a local and regional level:

> Our mission of disseminating knowledge is only half complete if the information is not made widely and readily available to society. New possibilities of knowledge dissemination not only through the classical form but also and increasingly through the open access paradigm via the Internet have to be supported. We define open access as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community.[70]

Biological Innovation for Open Society (BIOS) is a new program of open access of the global biotechnology community to scientific and genetic knowledge and tools. Richard Jefferson, the founder of the non-profit organisation, CAMBIA, based in

[66] Strathern (1999): 168.

[67] Strathern (1999): 169.

[68] Strathern (1999): 169.

[69] The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 20-22 October 2003.

[70] The Berlin Declaration (2003).

Canberra, Australia, claims that the privatisation of such knowledge and tools stifles creativity rather than rewarding and encouraging innovation. In keeping with the principles of the World Summit on Information Society, Jefferson describes the "democratisation of innovation" based on this open access to genetics, known as "open source genetics."[71]

Regional scientific research partnerships, referred to by some commentators as the "Scientific South,"[72] have begun to realise a form of collaborative or distributed scientific innovation that approximates the "new" innovation community suggested by open access models. This regionalisation of scientific development facilitates the acting of developing countries together as individual inventive units. One such regional research bloc between Brazil, India, and South Africa, has been described as providing significant tools in capacity-building for developing countries as trading groups of nations, rather than emphasising national sovereignty:[73]

> There is no such thing as "national science." It is the essential strength of science that it must be universal and replicable by anyone. National scientific cultures, however, do exist, as do national scientific infrastructures and education systems. Science may be universal and equal. The conditions in which scientists work are not, nor are the ends which they are encouraged to pursue.[74]

Scientific development is not necessarily something that can be assimilated within models of national sovereignty over intellectual and other resources. Indeed, this model of development is useful when considering the relationship between community actors and resources, particularly in view of the criticisms and concerns in respect of conventional models of access and benefit-sharing. Thus, while forces of

[71] Salleh (2003).

[72] Steffen (2003).

[73] Dickson (2003).

[74] Steffen (2003).

globalisation may be problematic in the "universalisation" of intellectual property rights, equally a form of counter-globalisation[75] may be appropriated by developing countries, in pursuing measures by which to protect and share traditional knowledge in ways both acceptable to international trade and effective in protecting that knowledge from privatisation and restriction. The agreements between these state actors have been described as significant in that each country is rich in traditional knowledge that might otherwise be vulnerable to expropriation by the developed North:

> Each of the countries mentioned is rich in both biodiversity and local cultural traditions, making them prime targets for those seeking traditional knowledge that can be incorporated into, for example, new medicines. And each is now facing the task of devising methods to protect their traditional knowledge that are compatible with the intellectual property rules of the new international knowledge economy. There is therefore a strong incentive to share both experiences and novel solutions. Which is what India has offered to do, for example, with its promise to help South Africa set up an electronic database of traditional knowledge comparable to the one established in Delhi by the Centre for Scientific and Industrial Research (CSIR).[76]

However, whether this relationship between states, albeit states within the developing South, is completely successful in the context of local community, is not entirely certain. Indeed, benefit-sharing with local and traditional communities may present a further and distinct question. Nevertheless if access remains open and unhindered, the open model of scientific collaboration may address some issues of agricultural and food security, access to seed and traditional medicines, and freedom to practise traditional agricultural and medicinal method.

[75] Hardt & Negri (2000): 207.

[76] Dickson (2003).

3. Open Access Models and Traditional Knowledge

3.1 Abandoning Intellectual Property?

There persists throughout discussions and commentary on this area, a common misconception that open source software means abandoning one's intellectual property rights.[77] However, for free and open source software licences to be enforced, intellectual property rights must subsist in the original software.[78] The recommendation of open source models of protection for traditional knowledge, therefore, not only appears to betray a common misconception about the nature of open source, but also inadvertently to support the ongoing assumption that traditional knowledge is for the benefit of all and that protection necessarily involves ways in which to sustain the ongoing sharing of that knowledge.[79] As discussed in greater detail in preceding chapters, this is a harmful generalisation and characterisation of their traditional knowledge as without owners, undifferentiated, and indiscriminate in its dissemination among all members of the community.

Despite the serious problems with an undiscerning translation of free/open source models to traditional knowledge, several principles of the free/open source models are nevertheless relevant in developing a "modification" as it were, that can be of value to traditional knowledge holders in developing "open access" schemes for protecting knowledge and ensuring ongoing dissemination amongst Indigenous and traditional communities.

3.2 Ownership

As discussed, it is inaccurate to argue that there is no "ownership" within Indigenous or traditional communities, and to do so is to deny custodianship and legitimate the

[77] See Lessig's criticism of this common misconception in Lessig (2004a): 264-65.

[78] Guadamuz González (2004).

[79] Shiva (2001): 49-51.

exploitation of traditional knowledge as a public resource. This denial of a proprietary-like relationship to resources is a disingenuous and inaccurate construction of resources as public for the purposes of legitimating their removal. It is this denial that facilitates the subsequent ownership or dominion created over those "public" resources through the application of intellectual property systems in favour of the misappropriation. This line of "global resources" reasoning fails to understand that customary use or communal custodianship is simply a different model of possessory-like relationships to the resources.

3.3 Intellectual Property

Fundamentally, all of these "open" or "non-proprietary" systems depend upon intellectual property rights subsisting in the original software. In other words, intellectual property rights, rather than restricting dissemination of information, are the way by which to ensure dissemination of information occurs in the freest sense, under the open source model.

Thus, for this model to be of benefit to traditional knowledge protection, what must be confronted is the inevitable problem of finding intellectual property rights in traditional knowledge, or some kind of rights through which to enforce the licence. Rather than addressing the fundamental concerns motivating traditional knowledge protection, the application of open source models may simply re-instate the primacy of intellectual property perspectives upon that knowledge and community creativity, overlooking the importance of the relationship between community and resources.

3.4 Specific to the Technology?

A further problem is whether the specific nature of the technology from which free/open source models were developed makes the solution rather particular to the digital economy. Where problems arise translating the specifics of this model is in the

particular nature of software. Software developers in this scheme may secure intellectual property protection for their modifications, provided they disclose the source code. In translating open source philosophies to other technologies, the efficacy of the model remains as yet unclear.[80] For instance, in biotechnology industries, improvements upon the core technology may be patented, but it is not entirely clear what is returned as a public good, or how.[81] The "technology" to which access is to be maintained is much more diverse when applying these concepts to scientific research in general and to the specific concerns of traditional knowledge protection. In particular, not only information but also access to physical products, seed, medicinal plants, and so on, must be addressed.

Some have suggested that "open hardware" approximates more usefully the concerns raised by traditional knowledge protection.[82] The development of the system in the context of other areas of innovation has been referred to as the open hardware movement, and is based on the kind of knowledge societies lauded by the World Summit on Information Societies. "The open hardware movement has its roots in the radical technology movement of the 1960s, inspired by Ivan Illich's 'Tools for a Convivial Society,' and the subsequent development of bazaar-style chip manufacture."[83]

Proponents of these models claim that industry will have to rely on competition and improving its production and product, rather than restricting information, in order to

[80] Indeed, the application of the "open source" model to other technologies has, at this stage, been more in the form of use agreements rather than according to the licensing agreements established in open source software. See Guadamuz (forthcoming).

[81] Guadamuz (forthcoming).

[82] See the beginnings of an open hardware movement at http://www.openhardware.net/

[83] Open Source Biotechnology Project. http://rsss.anu.edu.au/~janeth/home.html

secure and maintain its position.[84] On the other hand, "open access" models such as the one which produced such a rapid documentation of the human genome, share aspects of free/open source philosophies without falling into the traps of attempting to apply open source in a not necessarily analogical environment.[85] In particular, can the model suggested by free/open source software, which deals with copyright, be transferred to the patent system, which generally involves much more costly processes and administration? Perhaps what is necessary in the context of traditional knowledge is a re-consideration of the patent protection itself, together with these systems of licensing and access. But at this stage the general principles of access remain immediately relevant to the subsequent treatment of material developed from traditional knowledge.

For instance, K Ravi Srinivas has set forth a model for common innovation in the context of agriculture in developing countries, referred to as the Biolinux Model.[86] Srinivas suggests that new plant varieties would be developed through schemes of participatory plant breeding, and recommends making plant varieties available for use and research on the basis of a GPL type scheme, enforced through agencies managed by farmers and breeders, with materials exchanged under Material Transfer Agreements (MTAs).[87] For the model of community resources developed in Chapter 9, open access models, such as the Biolinux Model, will be relevant in dealing with innovations based upon traditional knowledge that has been previously accessed with the free and prior informed consent of communities.

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[84] Lessig (2001). See also Preimesberger (2004).

[85] Open Source Biotechnology Project. "Open Source Biotechnology?" http://rsss.anu.edu.au/~janeth/OSBiotech.html

[86] Srinivas (2002): 321-28.

[87] Srinivas (2002): 325-26.

3.5 Modifying Intellectual Property

Intellectual property rights are not absolute rights of ownership over an object, but a right to use something in a particular way according to certain conditions. Thus, defensive measures described in the Sixth Session of the IGC involving the documentation of traditional knowledge, while problematic in many ways in that such measures do not introduce positive rights in traditional knowledge, may create a way in which intellectual property rights cannot limit the circulation of that knowledge if that intellectual property is created upon that traditional knowledge. In this way, a concept of ownership assimilable within an international intellectual property system is created, that may be enforced with respect to knowledge subsequently developed upon that knowledge. The WIPO International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge reported in 2001 that effective application of free/open source schemes in the context of traditional knowledge requires the observation of intellectual property rights, but according to open source principles of sharing, and further, that the importance of a mixed approach of both open and private schemes should not be disregarded:

> [T]he set-up of Integrated Collaborations requires a flexible unified scheme for fast but also accurate encoding IP agreements. As shown in the case study, such IP schemes can however also incorporate the open source basic IP sharing principle. Creation of an easy to deal with IP scheme can result in less averse IP aspects and enable an active but economically feasible IP approach rather than ignoring it.[88]

The monopoly extended over copyright materials is more limited than that created by patent rights, the latter being subject to a shorter duration of protection, arguably as part of the balance with a more extensive monopoly. In a scheme inspired by

[88] WIPO/ECTK/SOF/01/CRP.1 (May 2001): 34. This document collects extracts from the Final Report of The Workshop On Intellectual Property Rights (IPR) Aspects of Internet Collaborations. International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, held at the Boyana Government Residence, Sofia, 29-31 May 2001.

free/open source models, patents built upon traditional knowledge may nevertheless be created, but must be completely disclosed and could not be exercised according to the strict monopolies that currently apply. This would emphasise creativity, rather than property in objects, and would facilitate ongoing development, without threatening medicinal, food and agricultural security through the patenting of traditional knowledge.

At this stage in the open source debate, the relationship between patents and open source models remains unclear and complex.[89] It is beyond the scope of this work to negotiate this aspect of the debate effectively, but it is important to remain aware of the potential limitations of open source when dealing with knowledge across the categories of intellectual property,[90] particularly in respect of the model of community resources, which eschews the problematic and artificial categorisation of traditional knowledge according to such categories. If the relevance of open source is somewhat defined by the technology, then its application to traditional knowledge problematically pre-supposes the categorisation of that knowledge according to the very classificatory process that the concept of community resources seeks to overcome.

Suspicion of Non-Commercial Models?

A certain accountability is seen to come from branding, and the ability to identify the "owner" as the source, as distinct from the suspicion of the "chaos" or perceived instability created by the input of multiple creators that might otherwise be

[89] For a discussion of the relationship between open source and software patents, see McMillan (2004a); McMillan (2004b); Singer (2004).

[90] Guadamuz (forthcoming).

"summarised" under a corporate identity (Microsoft, for instance).[91] This accountability or responsibility suggests an ongoing adherence to origination, and to notions of human intervention and control, upon which intellectual property rewards are premised. Indeed, such is the power of branding, with respect to the process of origination, that monopolies created through statute may indeed by "extended" by the effects and security of branding.

This suspicion also seems to be related to conventional models of innovation. As discussed earlier, open source/access models of innovation, as discussed, approximate far more effectively the traditional models of knowledge generation and incremental or evolutionary innovation that might be found in Indigenous and traditional communities. Thus, "open" innovation, if it may be referred to as such, is devalued as innovation in ways similar to that seen applied to traditional knowledge development. Open source development has been described as producing less reliable products and involving a less "valuable" process in terms of the investment and effort that is seen to "evaluate" the kind of human intervention necessary to find intellectual property which may be rewarded.[92]

Thus, open models may not necessarily be beyond intellectual property models, but do they defy the "branding" which is becoming increasingly necessary to the establishment of the "product"? As discussed in previous chapters, in the creation of transformation from knowledge to information, there arises an almost ethical or moral

[91] Similarly, pharmaceutical patents may informally extend beyond the monopoly period, by virtue of branding and trade marks, and the influence on consumer trust and confidence. Indeed, branding suggests a significant means by which to secure commercial return to powerful industry without necessarily denying access to generics through long patents. Although beyond the scope of this work, branding could support a relaxation of patent law and/or a shortening of the monopoly period.

[92] See the discussion of the initial relationship between the corporatisation of software brands and their likely uptake by large clients: Selby (2004).

obligation to disseminate that information within society. Thus, knowledge takes on an identity or a momentum of its own, which becomes separate from its creators or indeed communities. Branding may be appropriated as a kind of regionalisation. For instance, consumers may make decisions about food as a regional product rather than global (as seen in the passionate debate over the extension of geographical indications). Potentially this could have impact for traditional knowledge protection, and may provide a link with place and origin (culture and community).

Access and Benefit Sharing

Fundamentally, one of the key conflicts between the model of knowledge generation in open access communities and that of traditional communities, is the different perspective upon access and freedom of knowledge. As will be seen in detail in the following chapter when discussing biodiversity and international environmental programmes, a major problem arising for benefit-sharing models is the identification of the group with which to share the benefit. This is further exacerbated by the subjugation to "national sovereignty" in the provisions of the Convention of Biological Diversity (CBD).

Concluding ...

Free/open source models appear to offer, therefore, an intriguing way in which to react to traditional knowledge through intellectual property systems. Such models promote the open and incremental development of knowledge, despite the constraints of individual ownership and control over a multiple creative process imposed by intellectual property laws. Free/open source models address not only concerns over material access to resources, including seed, medicinal plants, and so on, but also the possibility of facilitating innovation and creative processes according to the customs and practices of traditional and Indigenous communities. Thus, in a very real sense,

these principles may include the tools by which to deliver capacity-building at the level of community, rather than mere access at the level of the object. However, the fundamental and critical differences with respect to access and the expression of "freedom" make the wholesale application of these models problematic.

Intellectual Communities and Resources in a Global Market

This and the previous three chapters have demonstrated the limitations of intellectual property rights, and the concerns that such regimes do not offer the necessary paradigm within which to realise and preserve traditional interests in resources of knowledge, custom, and practice. Legislative methodology remains a national imperative, although the objectives of that legislation are indeed internationalised within the context of a global economy and the liberalisation of trade. This central concern with the liberalisation of trade may be criticised for the possible prioritising of the objectives of developed and industrialised countries,[93] at the expense of those developing countries and least developed countries vulnerable to competition[94] and traditional communities outside the values rewarded in this system.

Rather than empower the Indigenous community, the assimilation of traditional knowledge within intellectual property systems risks merely interpellating the Indigenous community, in the mimicry of western individualistic property values. Any evolutionary capacity of the culture must not, therefore, come from external pressures and regulatory changes forced through conforming to an intellectual property regime, but through internal practices and self-management specific to any particular community and its unique identity. It is necessary to consider the potential

[93] The TRIPS Agreement has been identified as motivated by the needs of United States business, served by the strategic linkage of international trade to the development and enforcement of intellectual property rights and standards. See Drahos (1995): 8.

[94] Stiglitz (2002): 17.

for a community-based system, in which the Indigenous and traditional claimants themselves are empowered to establish the community and the traditional nature of the knowledge, as a matter of fact. It is this very process of recognition and mutual identification that founds the traditional nature of the knowledge at the centre of the current discussions.

If intellectual property regimes, as discussed in the previous chapters, and open access models derived from those regimes, fail to address traditional knowledge, it is now necessary to examine other possible paradigms for protection. The next chapter considers the possibly global consequences of threats to biodiversity, and the potential for an international framework of protection based upon principles of international environmental protection and obligations. As will be the concern of subsequent chapters, the problems in fact may be merely exacerbated by the intrusion of negotiation and agreements between multinational interests and states, with Indigenous and traditional groups marginalised by those negotiations. Particularly in the context of international environmental agreements, and transnational access to biological resources, the potential for overlooking community is considerable: "Biopiracy thrives under conditions in which Indigenous peoples have little legal protection in terms of ownership of the natural resources found on their lands and their related intellectual property rights."[95]

The nature of ecological resources as global public goods does not necessitate the homogenisation of society as a "global civil society," which pre-supposes uniform social objectives. However, the effects of the risk attached to global public goods,

[95] Fourmile (1996): 40.

such as those of environmental or ecological resources, are beyond rational calculation and are deterritorialised, rendering them global and provoking the integrative formation of a global risk collective.[96] Thus, decisions themselves are placed beyond the public sphere; rather, it is the consequences themselves that create the public in a world subject to the self-conscious process of modernisation.[97] The grand narrative of ecological risk, and the possibility for the local intrusion of community, is the subject of the next chapter.

[96] Beck (2002).

[97] Beck (2002).

Chapter 6: The Cultural Diversity in Biodiversity

> She occupies a voice, an odor, a silhouette, a set of movements: such is the *oikos*. She takes no one to court to safeguard her property. She doesn't need a soil, a blood, or even an apartment; all she needs is to belong, *oikeion*.
>
> Jean-François Lyotard, *Oikos* (1988).[1]

Introduction

In the previous chapters the "grand narrative" of intellectual property law was examined, and its framing of traditional knowledge and conferral of "authenticity" problematised. Now turning to possible alternative or additional platforms for protection, the relationship between traditional knowledge and biodiversity seems to present important possibilities, particularly in the "location" of cultural diversity in the local enrichment of biodiversity.

Chapter 2 considered the relationship between intellectual property and the management of risk in innovation, where knowledge is transformed as information commodities for potentially global consumption. In many ways, the globalisation of ecological risk, while motivating public concern and recognition of international obligations towards biodiversity,[2] even if that obligation is not always undertaken,[3] may at the same time marginalise community in the context of local biodiversity and ecological knowledge. John Scott, Secretariat of the UN Permanent Forum on Indigenous Issues, describes this inconsistency between ecology as a global narrative, and traditional ecological knowledge:

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[1] Lyotard (1993b): 96.

[2] Fiona Macmillan notes that it was increasing public concern that motivated the development of the CBD, the Rio Declaration on Environment and Development, and Agenda 21. Macmillan (2001): 119.

[3] For instance, the United States of America is yet to ratify the Convention on Biological Diversity.

> I was working with an elder who was complaining that there was too much rainforest, because the area that they traditionally burnt off to create grassy slopes to bring in grass-grazing animals had been taken over by the national parks, and none of it was being burnt off. There has been a direct loss of the biodiversity because of the mismanagement by the national parks. So the national parks said, "Aboriginal people used to burn off every year, so we will burn off a whole side of this mountain range every year in August." Aboriginal people had burnt off tiny areas. So traditional knowledge, even when it is picked up by somebody else, can be misused and do great damage.[4]

What is required is a revision of the traditional concepts and language within which the nature of Indigenous and traditional interests can be understood and their protection achieved, in the context of this "risk" of their loss. Earlier discussions have shown that in a global risk collective, the deterritorialised risk is no longer that of the individual community, but becomes reterritorialised as a social, global, collective risk which defies the conventional nature of the state, yet re-inscribes the state as the ultimate means of achieving consensus as to the calculation of (and insurance against) such risk. This is seen most particularly in the language of the Convention on Biological Diversity (CBD), where responsibility for the protection of biodiversity is shifted from the community to the national sovereignty[5] as the "gatekeeper" of resources.[6] This is facilitated by the construction of biodiversity as "objects" or "artifacts," of which traditional or Indigenous use may be construed in a particular example as "wasteful"[7] or contrary to the preservation of that local biodiversity.[8]

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[4] Scott (2004): 8.

[5] See in particular the Preamble and Article 8(j) for the priority of national sovereignties over communities.

[6] IPCB (2004b). See also Dutfield (2000).

[7] See earlier discussion of use as "waste" where it is preservation of the object that is deemed a priority, rather than preservation of the relationship. Where traditional use is regarded as incompatible with the protection of local biodiversity, the principle of balancing harm (considered throughout and developed more fully in Chapter 9) may indeed be relevant, but it remains prudent to consider the objectives of preservation and the priority of biological objects over community resources.

[8] Note the discussion in Dutfield (2000). See also the current controversy of the Western Shoshone battle, www.wsdp.org. See also the discussion in Cruz (1996) on the relationship between biodiversity and traditional use of lands, in the context of fishing and hunting rights.

The previous chapters raised questions regarding the possible relationship between traditional knowledge and biodiversity protection, prompting an examination of the interaction between biodiversity protection and the international intellectual property system. This must now be considered in the context of traditional knowledge.

The Globalised Environment and the Privatised Intellect

Environmental issues (such as global warming and pollution) are commonly constructed as global externalities (in other words, external to community) and related to the consumption, exhaustion, and transformation of global public goods, thus readily explicable within a paradigm of global market values.[9] This conceptualisation of the environment enables, and is enabled by, the concepts of global collective society and global collective action. Potentially, however, it legitimates the practice of bio-prospecting as the collection of global biological resources for the benefit of the whole of humankind. In this way, conventional economic models of the environment are legitimated as ways of invoking national and corporate responsibility, at the same time marginalising community management.

Earlier chapters discussed the danger of applying conventional economic models of intellectual property law to traditional knowledge, including the application of copyright to folklore, patent law to traditional botanical, agricultural, ecological, biological, and medicinal knowledge, and so on. It was suggested that this taxonomic interpretation of aspects of traditional knowledge assumes that knowledge is apparently synonymous with particular categories of intellectual property law. However, the commodification of information as the object of protection neglects the fact that the fundamental subject matter in community resources is the dignity and

[9] See generally, Beck (1995).

very practice of culture in respect of that knowledge, including customary management and decisions concerning its disclosure and use.

Importantly for the development of appropriate and relevant protection for traditional knowledge, there needs to be a fundamental shift in the way in which the protection of this "information" is understood. In the context of the present discussion, the promotion of cultural diversity through the acknowledgment and protection of traditional customary practice and knowledge is necessarily also for the protection of biological diversity through the facilitation of ongoing sustainable use and management of the land at a local level. Protection of unique biodiversity, in this way, is simultaneously a recognition of and respect for cultural diversity in the Indigenous and traditional communities as a global resource:

> The interdependence of biological and cultural diversity challenges the view of environment as something without humans ... Existing biological and cultural diversity occurs predominately in humanised, cultural landscapes and seascapes inhabited by Indigenous nations.[10]

It is strategic to remain mindful of the way in which cultural diversity, presented as a global public risk, might facilitate obligations to customary law through the preservation of its practice *in situ* as, in and of itself, a form of traditional ecological knowledge. Is it possible to recuperate the global risk narrative in this way, in order to re-invigorate, paradoxically, the "little stories" of Indigenous and traditional communities?

Earlier chapters have examined the strengthening of intellectual property laws, primarily in the context of maintaining the market and justifications of incentives for creativity, mediating and possibly deferring benefits to the public. Furthermore, by

[10] Hyndman (1994): 299. This possibility of the "little stories" and "minor laws," as it were, in the discourse of international human rights law is examined in Chapter 8.

constructing natural community resources as global public goods, both in terms of biodiversity and in terms of cultural heritage, the revenue raised by the management of such resources as global resources becomes revenue earmarked for financing the problems of global public goods, such as atmospheric change and loss of biodiversity, rather than understood in terms of community autonomy and self-governance.[11]

What must be examined is the way in which environmental policy and developments in intellectual property law, in responding to globalised market values, might indeed mask what are private, commercial interests, presented as matters of public policy. The management of global public goods, if they are indeed to be understood in this way, is necessarily a public matter. However, the "information" of global public goods is seemingly inextricable from the incentives of private property that are the domain of more restrictive intellectual property laws.

Indigenous or traditional medicinal and agricultural knowledge presents not only significant potential to commercial interests for the identification and privatisation of biological material,[12] but also important systems of management and preservation of the biodiversity of local resources. Through an intellectual property model, the commercial exploitation of that knowledge and resources removes the product and is generally accompanied by disclosure from communities of the traditional use and knowledge of that product. Broadly speaking, the flow of genetic resources occurs from developing and least-developed countries (LDCs) to developed countries,[13] frequently through the efforts of private commercial interests[14] that are re-presented

[11] Beck (1995): 76-77.

[12] Blakeney (2002): 43.

[13] Shiva (2001).

[14] Adair (1997): 141. Christie J (1995): 241-242.

as national concerns through the impact of international trade rules upon the subsequently created intellectual property. Where this taking occurs without adequate compensation, developing countries and LDCs are effectively deprived of "rewards" and "incentives" for the conservation of their biodiversity and their sustainable farming practices.[15] More importantly, even where adequate benefit-sharing agreements are in place, the role played by communities appears tangential or even inconsequential where they are not parties to any contractual arrangements.[16] Such interference with the local community structure can also fracture the community through the interruption of traditional authorities and ethics with respect to resource management, and through the depletion of local resources. Other commentators maintain that "(e)ntrance into market economics weakens local cohesion as a few entrepreneurs emerge and claim individual rights over what had been communal resources."[17]

While the natural resources themselves were historically considered *res communis*[18] (wild and without owner, but potentially the property of the state), Indigenous and traditional philosophies may be considered to understand land (as nature rather than

[15] Adair (1997): 141. See also Christie J (1995): "Why, they ask, should their knowledge be considered public property, when products derived from it fall under the monopoly control of intellectual property protection? In Australia, Europeans have published records of Aboriginal medicinal plant uses since early colonial times. New compendia are still being compiled and published, with no assured protection of Aboriginal sources" (241-42).

[16] For instance, see the example of the bioprospecting and benefit-sharing agreement between the International Collaborative Biodiversity Group-Drug Discovery and Biodiversity, and the Maya (Mexico). Described as an attempt to acknowledge the principle of prior informed consent and comply with the provisions of the CBD, the project nevertheless was severely criticised by the Rural Advancement Foundation International (RAFI) and the Consejo de Médicos y Parteras Indígenas Tradicionales de Chiapas (Council of Traditional Indigenous Doctors and Midwives from Chiapas) or COMPITCH. See the discussion in Hardison (2000), and the criticism in RAFI (2000), (1999a) and (1999b).[17] Alcorn (1995): 41.

[18] Frow (1997): 194.

private place) to be beyond appropriation as property[19] and beyond "authorisation" as creativity: "nobody can own what exists in nature except nature herself."[20] It is the knowledge or information about those natural assets, and the relationship between community and practices with respect to the land and biodiversity, that comprise community resources warranting protection. These community resources are threatened with exhaustion or extinction if reproduced through commercial exploitation in ways contrary to the ongoing expression and practice of this relationship in the context of the sustainable development of the land.[21] The objectification of the natural resources, which allows this separation between human subject and the objects of biodiversity, is to a large extent in conflict with traditional ecological knowledge and philosophies: "Aboriginal people don't consider that we own our traditional territory; we consider that the land owns us. We are not separate from the natural environment, but rather part of it, and by being part of it we enrich it."[22] In the context of the "traditional knowledge" of rites and practices with respect to those resources, the relationship between human actors and biodiversity is more complex than a simple utilisation of natural resources:

> Where we have lost traditional languages we have lost traditional knowledge and there has been a direct loss of biodiversity. There is a link between indigenous people, our languages, our knowledge, and all the animals that live around us.
>
> This reinforces the point that we are not separate from the natural environment. The great mistake the Western world is making is to take

[19] Scott (2004).

[20] Indigenous Peoples' Statement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the WTO, NO To Patenting of Life! (1999).

[21] This notion of exhaustion has been considered in earlier chapters, particularly in the context of community freedom of expression and the transformation of cultural symbols and resources through inappropriate use outside the community, thus interfering with the means to access that expression.

[22] Scott (2004): 8.

> yourselves out of the natural environment and to think that it can be controlled by modern technology and that that is somehow a sustainable thing to do.[23]

Furthermore, the fact of substantial financial investment, and subsequently the commercial "authoring" of research into goods based upon those natural resources, may have the effect of rendering those public "goods" private by transforming them into restricted and scarce objects through the intellectual property scheme:

> [T]he argument that information is not in itself a scarce resource comes precisely from those groups that have sought to make it so. The commodification of the genetic commons has been effected by means of an investment of work, knowledge, and capital in a public good in order that it may then be treated as a scarce private good. It has been an act of enclosure rather than an opening of the public domain.[24]

How might traditional knowledge, including customary law as intrinsic to that knowledge, be protected through international obligations to and respect for biodiversity? Are some of the most important national and "natural" resources in fact the cultural diversity, the community, in biodiversity?

The International Legal Ecology

1. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

As explained in Chapter 2, but necessarily reiterated here, the TRIPS Agreement is significant for "annexing" intellectual property rights to the agenda for international trade in goods.[25] Of particular significance to the present discussion, is the ongoing importance of intellectual property rights and their enforcement in the trade rounds of the WTO, particularly as evident in the Ministerial Declaration adopted on 14

[23] Scott (2004): 8.

[24] Frow (1997): 204.

[25] The text of TRIPs may be found at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

November 2001 in Doha (Doha Declaration).[26] The Doha Declaration includes a mandate to review the patenting of biotechnology in the context of issues of biopiracy and the specific interests of developing countries.

The ongoing dominance of the intellectual property framework in discussions of traditional knowledge has been a concern throughout this work. Nevertheless, the explicit recognition of biodiversity obligations in the Convention on Biological Diversity (CBD) and the recognition of traditional knowledge and the problem of biopiracy in the Doha mandate, demonstrate the increasing relevance of biological resources to the global trade in information. As discussed earlier, the Fifth Session of the IGC,[27] staged in July 2003, called for a greater inter-instrumental approach, including interactions with the CBD,[28] an objective pursued in the Sixth Session. Chapter 4 detailed the movement towards a truly international cooperation on traditional knowledge in the context of international trade. Combined with the central consideration of biodiversity, these discussions suggest that the recognition and protection of the sovereignty of Indigenous and traditional communities in the management of their resources is vested in the international community. Therefore, a consideration of the details of the international framework, of which the CBD is an element, is prudent to the present discussion of community resources.

[26] As introduced earlier, the Doha Declaration, 2001, has a mandate to address a variety of issues concerning international trade and economic development, including traditional knowledge in the context of development. Negotiations take place within the Trade Negotiations Committee and its subsidiaries, with other work occurring within WTO councils and committees, including the WIPO IGC: WT/MIN(01)/DEC/1 (20 November 2001).

[27] As explained in the Introduction, and considered in detail in Chapter 4, the WIPO IGC was established in the 26th (12th Extraordinary Session) of the WIPO General Assembly, held in Geneva, 25 September to 3 October 2000.

[28] The text of the CBD may be found at http://www.biodiv.org/doc/legal/cbd-en.pdf

2. The Convention on Biological Diversity (CBD)

The CBD, concluded 5 June 1992, was the result of discussions at the Rio de Janeiro 1992 United Nations Conference on Environment and Development (the "Earth Summit") towards a strategy for sustainable development, following negotiations that had commenced in November 1990 under the United Nations Environment Programme (UNEP).[29] The CBD, administered by the UNEP, establishes principles for the protection of the environment while ensuring ongoing economic development, emphasising conservation of biodiversity, sustainable use, and fair and equitable benefit-sharing of that use of genetic resources. The CBD is also a potentially significant international instrument in the development of rights in Indigenous and traditional resources, in that it suggests localised community control of resources and aspires towards equitable distribution of benefits to the communities involved as well as the state. Primarily, however, the CBD re-invigorates national sovereignties with respect to biological and intellectual resources[30] while merely recommending the recognition of local communities through their engagement in respect of consent and returns (remunerative and otherwise), a potential limitation discussed in more detail later.

At the time of writing, 188 countries were parties to the CBD, thus potentially providing for global coverage[31] and important acknowledgment of Indigenous and traditional cultural and resource rights: "The importance of the CBD as a tool for Indigenous and traditional groups lies in its recognition of the contributions of

[29] Adair (1997): 142. See also Commins (1993) for a useful discussion of the Draft Convention and its implications.

[30] Article 3 acknowledges national proprietary rights.

[31] Sutherland (1995a): 37.

Indigenous and local communities to the conservation of biodiversity."[32] The capacity of this document to organise relationships between states with respect to traditional knowledge, however, persists largely as potential as it remains unratified by the United States and is implemented in mostly unsatisfactory ways in other developed countries.[33] Furthermore, the subjection of local autonomy ultimately to national sovereignties raises critical concerns, and suggests that the potential of the CBD is greatly compromised with respect to international harmonisation of community approaches to the protection of traditional knowledge.

Nevertheless, in order to address the emerging importance of the traditional or Indigenous community as legal actor, and how this might be given real application within an international context, the possibility of giving effect to cultural diversity through the protection of biodiversity is critical. For instance, addressed throughout this chapter is the continuing significance of the CBD in putting forward a framework for communal custodianship and benefit-sharing which could be interpreted and translated in order to emphasise local effective autonomy,[34] notwithstanding the efficacy or otherwise of the practical application of those principles in the domestic context to date. Furthermore, the CBD has been instrumental in various national efforts to implement *sui generis* laws towards the protection of traditional knowledge,[35] constituting evidence of international cooperation on the ultimate social

[32] King & Eyzaguirre (1999): 46.

[33] For instance, although Australia has ratified the CBD and implemented basic legislation, the legislative response has been disappointing to Indigenous groups: Keyes (1999); Keyes (1998).

[34] This is in contrast to the monopolies that are protected in the international intellectual property framework created by TRIPS. Indeed, the possibly conflicting relationship between these two agreements is a topic within the mandate of the Doha Declaration: WT/MIN(01)/DEC/1 (20 November 2001): Paragraph 19. The relationship between Doha and TRIPS will be examined later in this chapter.

[35] See the discussion of specific examples of implementation later in this chapter.

benefit of biodiversity through schemes which facilitate ongoing cultural diversity and local development.

3. Internationalising Protection

This work has maintained throughout that what must be developed and encouraged through the protection of traditional and Indigenous knowledge – as well as the communities themselves for whom that knowledge is critical – is dignity, wisdom, and continuity of culture and identity. While interest in biodiversity as a global genetic and economic resource has gone a long way towards encouraging sustainable use of the environment, the importance of conserving the traditional and Indigenous methods of utilising and managing natural resources, and indeed the relationship between communities and resources as well as the tangible or material object, must also be acknowledged: "Not only are we losing resources in terms of species and their populations but knowledge of how medicinal plants have been used by native cultures."[36] This raises the critical aspect of this discussion, as to whether the necessary value for recognition of Indigenous and traditional management is to be found within the global discourse of biodiversity rather than the localised deprivation arguably sustained by conventional intellectual property rights that has been considered in the previous chapters.

As discussed earlier, it is problematic to understand the relationship between community and international protection as a simple dichotomy between the local "Indigenous" and the global "International." Earlier chapters have shown that merely opposing the local/international reinstates the conventional historical and geographical sentimentalisation of community. This polarising and generalising effect

[36] Heywood (1999): 27.

upon Indigenous and traditional communities must be dismantled if a system based upon the concept of community resources is to be effective and innovation in tradition is to be recognised. Thus, the construction in the CBD of this relationship between the community and international management of resources requires particular attention.

4. The "Indigenous" International

The phenomenological generalising of community and of its cultural production operates to varying degrees within the international instruments themselves, in the way in which those treaties define and delimit the term "Indigenous." While the relationship between TRIPS and the CBD will be considered in more detail below, it is useful here to consider the characterisation of "Indigenous" and "Community" within these critical instruments, and to recall the problematising of these terms in earlier chapters.

Within TRIPS, there is no consideration of local or Indigenous groups, the terms of that agreement concentrating solely on the rights, authority, and capacity of states or national governments. Thus, the framework of TRIPS facilitates the sovereignty of nation-states in the traditional sense of the international agreement, but as applied to the standards of private rights in intellectual property law. Within this context, the community or local Indigenous group is summarised merely in terms of a geographical instance of, or relationship to, the national identity.

The CBD, on the other hand, while not defining "Indigenous" within its "Terms of Use," does explicitly acknowledge the capacity of Indigenous and local groups in its Preamble. The Preamble makes the agreement between the Contracting Parties potentially subject to the recognition of:

> the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the

> desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[37]

Despite this recognition of community, which is sustained throughout the document, the CBD nevertheless emphasises the sovereignty of states with respect to the preservation of biological resources, noting that such protection is ultimately the responsibility of states.[38] Similarly, while the CBD provides for *in situ* conservation, consistent with community autonomy and governance, those community interests are to be subject to national laws.[39] Again, place (*in situ*) is concerned merely with the location of objects (and the objectification of people and communities themselves as historicised objects within that location), rather than the interaction *in situ* between community and resources as itself a cultural asset and the subject matter of biodiversity.

5. The "National" Sovereignty

In the past, the "collection" of biological and genetic resources was facilitated by virtually free access to what were considered natural and "un-authored" objects justified by the argument that these were global biological resources to benefit the whole of humankind and could not be restricted or comprehended in terms of geographical location (*res communis*). While the developed world exhausted genetic and natural resources through commercialisation and industrialisation, and the reduction of genetic diversity through intensive breeding practices and agricultural monocultures, developing nations to a large extent have preserved their biodiversity

[37] The Convention on Biological Diversity. http://www.biodiv.org/doc/legal/cbd-en.pdf

[38] Preamble.

[39] Article 8(j)

through traditional agricultural practices that also continue the cultural heritage and identity of local communities.[40]

Community-based farming and agriculture has for the most part caused minimal impact and indeed has managed and preserved the biodiversity of their local resource.[41] On the other hand, outside exploitation of local genetic and biological resources is without the same long-term interdependence and relationship with the environment, and is arguably unsustainable if it occurs as a harvest of "information" rather than a customised cultural management of resources and knowledge:

> The level of exploitation by outsiders without a long-term dependence on the local resource is often of another magnitude of impact and highly unsustainable … Commercial operations extract the same products used by local people, but they generally exploit them for short-term profits without concern for long-term sustainability … Extraction of commercially valuable medicinal plants has also led to depletion or local extinction of populations of those species.[42]

In the context of ongoing commercial removal of resources from developing countries and LDCs in furtherance of private interests in the developed world, the conclusion of the CBD in 1992 introduced a significant change in the treatment of natural resources, recognising national sovereignty and acknowledging traditional knowledge of communities. Nevertheless, a mixture of concerns over the priorities of the instrument and its implementation by the international community may compromise the potential

[40] Adair (1997): 141; Christie (1995): "In short, the knowledge of indigenous and other traditional peoples … has gone un-acknowledged, un-protected and un-rewarded. It has been appropriated with impunity, to make millions for industry … Why, they ask, should their knowledge be considered public property, when products derived from it fall under the monopoly control of intellectual property protection?" (241-42).

[41] Alcorn (1995): 37. See also Decision VII/6 of the 7th Conference of the Parties, concerning Article 8(j) and related provisions, and the relationship between traditional knowledge and conservation and sustainable use.

[42] Alcorn (1995): 37.

value of this agreement to Indigenous and traditional communities. It is these concerns, in the context of global ecological risk, to which the discussion now turns.

Global Ecological Risk: The Convention on Biological Diversity (CBD)

While the CBD has been lauded for its recognition of cultural diversity as an instrument in the protection of biodiversity,[43] the "salience" of the importance of biodiversity continues to be articulated in terms of international trade and global economic resources:

> What place does a conservation agency have in taking advantage of our natural biological assets? Cynics might say that such activities are about wealth-generation, not conservation, but it is more and more difficult to achieve the latter without the former. Nowadays, a vital part of conservation work lies in changing attitudes to our environment. If we are to protect the goose that lays the golden eggs, the community must see some golden eggs.[44]

This transformation in the perspective upon the protection of biological diversity has been recognised as a shift from the notion of conserving natural areas to that of nature conservation as preserving a resource to be consumed:

> The new emphasis on the conservation of biological diversity as resource has added a very different dimension to the debate about the conservation of natural areas. Traditionally, nature conservation has been defined as a benefit to be provided, usually by government, rather than its destruction as a resource consumed, frequently irreversibly, and, consequently, a harm to be prevented.[45]

The CBD, at first instance, localises the global trade values foregrounded in TRIPS and emphasises the interests of biological diversity; however, the terms of that emphasis are still in the context of resources to be conserved for their sustainable commercial utilisation. While the CBD does acknowledge respect for traditional use

[43] King & Eyzaguirre (1999): 46; Sutherland (1995a).

[44] Armstrong & Hooper (1994): 14.

[45] Farrier (1996): 3. Further on the issue of reserves in the conservation of global resources, see Ingram (1990).

of resources by Indigenous and traditional communities, the possibly symbiotic relationship between cultural diversity in the relationship to resources, and the preservation of biodiversity through that customary management, is not necessarily revealed in the text. Rather, the components of biological diversity are constructed as objects of conservation, separately from customary relationships to those resources. Thus, the CBD may be read more strictly as a means for ensuring the sustainability of the bioprospecting industry,[46] to the ultimate detriment of community integrity and cultural diversity:

> If indigenous peoples are forced to relinquish their traditional customs and languages through, for example, assimilatory programmes which emphasise the conversion of their traditional economies based on biodiverse agricultural and hunter-gatherer ecosystems to cash economies based on monocultural systems of resource exploitation, then both cultural and biological diversity will suffer.[47]

Where the CBD presents a double-edged sword for Indigenous and traditional communities (as an important resource for the protection of traditional knowledge and simultaneously a distinct cause for concern), is in its articulation of a system of conservation of biological diversity as a universal heritage. This is despite the construction of resources as interests of national sovereignty, and persists as a governing principle towards the aims of biodiversity conservation. The emphasis upon biological resources and diversity as universal and common heritage[48] supports an attending assumption of its protection as a global risk, and marginalises community management of those resources. Of even greater concern is the way in which this discourse of common heritage displaces community as an "effect" upon

[46] Farrier (1996): 3.

[47] Fourmile (1999): 240.

[48] See the critique of "common heritage" and its demise as an appropriate concept in the context of traditional agricultural knowledge, in Brush (2003). See also Gepts (2004) on the question of ownership of resources.

biodiversity, as perhaps even contradictory to the objectives of conservation, with the customary management of resources presented as a further threat to the preservation of biological diversity in certain circumstances.[49]

With these concerns in mind, the impact of the CBD as an international agreement articulating capacity on the part of the community must be addressed. In making an explicit acknowledgment of customary and Indigenous knowledge and technologies, the concept of community resources, and the customary management of environment, is implicit.[50] How might community and the customary management of biodiversity be understood in this persistent global economic model of biological diversity and property?

The CBD ... Community Resources?

1. Benefit-Sharing, Access, and Consent: the Benefit of Doubt?

The emphasis in the CBD on access and benefit-sharing suggests significant progress towards the recognition of communities. However, these principles are nevertheless dependent upon the reckoning of natural resources as global public goods, accompanied by the "remuneration" for access to those goods through the sharing of benefits derived from those goods.[51] That is, the resources are transformed as components, objects which may be exchanged and for which "remuneration" may be due (whether that be financial or in other forms, including in the form of the transfer

[49] See footnote 8.

[50] Davis (1999): 14.

[51] Utkarsh argues that the sharing of benefits must be interpreted more broadly than that of financial benefits: Utkarsh (2003): 190-195. Arguably, the construal of benefits in ways other than financial still implies a commodity which may be exchanged, a resource which may be owned and alienated, suggesting an interpretation of the relationship between community and resources often contrary to that of Indigenous and traditional management of resources. Nevertheless, as will be seen, the requirement of free and prior informed consent is instrumental in recognising community autonomy with respect to resources and the capacity to insist upon traditional management and appropriate use. See also the criticism of the CBD in Boisvert & Caron (2000) and further Boisvert & Caron (2002).

of technology in Article 16). Remunerative models of this relationship, including the sharing of benefits and technology, despite possibilities for the capacity-building of communities, nevertheless are not concerned with community resources and community autonomy. Indeed, the cultural relationship between community and biological resources is never really clarified in the Convention text.

The Preamble explicitly recognises "the close and traditional dependence of many Indigenous and local communities embodying traditional lifestyles on biological resources," compatible with the concept of community resources, and continues that it is desirable to share equitably the "benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."[52] However, this is expressed without necessarily explaining why this sharing is desirable – that is, whether it is towards the capacity-building of local communities, in acknowledgment of a responsibility towards cultural diversity, in recognition of proprietary relationships to resources, or otherwise.[53]

Nevertheless, towards this equitable sharing identified in the text, Article 8(j) obliges each contracting party, as far as possible and appropriate, to respect, preserve and maintain traditional knowledge relevant to the conservation and sustainable use of biodiversity. What is to date largely unrealised is the potential for this Article to include customary law pertaining to the management, access, and utilisation of biological and genetic resources, as itself traditional knowledge related to biodiversity, for which efforts towards the facilitation and protection of its practice

[52] For a discussion of equitable benefit-sharing arrangements, see Mulligan (1999).

[53] Macmillan (2001) explains that despite the repeated use of "fair," "equitable," "share," and "benefit," these are never defined within the text, other than through implication (124-25).

and observation should be made. Of significance, however, is the concept of equitable sharing and the implicit characterisation of this relationship according to international principles of equitable balancing of competing interests and proportionality of harm – principles of fundamental importance to the application of community resources developed in Chapter 9.

Nevertheless, while the CBD is a potentially significant international instrument in the development of rights in Indigenous and traditional resources, in its recognition of possible localised community control of resources and the aim to provide for the equitable sharing of the benefits derived from them,[54] the actualities of its application are less heartening. It is only in the Preamble and Article 8(j) that the equitable sharing with communities is explicit, elsewhere making references only to contracting parties (that is, nation-states),[55] and that sharing is subject to national legislation. Thus, the autonomy of communities is problematically rendered subject to national sovereignties in the CBD in this construction of biological and genetic resources as national resources.[56] Therefore, it is unclear whether there is any genuine obligation to consider the interests of communities in this application of equitable principles. As in the discussion of open access models in the previous chapter, benefit-sharing may indeed fulfil an important aspect for the system of community resources with respect to biodiversity, particularly in the context of community autonomy and capacity-building, and where prior informed consent has been appropriately obtained. However, in the present application of this approach, this relationship between community, resources, and benefits is not being achieved.

[54] CBD, Preamble.

[55] CBD, Articles 10 and 15(7).

[56] Article 3 of the CBD recognises national proprietary rights.

Nevertheless, the CBD is commended for its acknowledgment of community in Article 8(j),[57] and in particular by NGOs[58] and civil society organisations, suggesting that this Article extends rights in ownership of traditional knowledge (at least traditional ecological knowledge and medicinal plants) beyond that which could be protected by existing intellectual property laws. Although Article 8(j) makes no explicit recognition of communal property rights, it has been interpreted as an important acknowledgment of the relationship between the natural resources and the community,[59] and an extension of rights in custodianship relevant to traditional knowledge protection:[60]

> [Art 8(j)] seems to affirm, then, that the holders ("subject to national legislation") have *rights* over their knowledge, innovations and practices, *whether or not they are capable of being protected by IPRs*. If they are not capable of being protected by the existing IPR system, there is still an obligation for governments to safeguard these entitlements either through a new IPR law or by other legal or policy measures. These duties should also extend to users of traditional knowledge, innovations and practices.[61]

However, Indigenous and traditional communities maintain concerns over its language and application[62] and over the continuing reluctance to make free and prior informed consent of communities a requirement of bioprospecting agreements.[63] In particular, this manifests itself in the ambivalence of the CBD towards actual "custodianship" of resources, deferring to a form of proprietary interest of national

[57] Fourmile (1999): 231.

[58] For instance, see Third World Network at www.twnside.org.sg. Compare the concerns raised in the Johannesburg Declaration on Biopiracy, Biodiversity, and Community Rights, August 2002.

[59] Fourmile (1999): 231.

[60] Dutfield (2000): 35.

[61] Dutfield (2000): 35 (emphasis in original text).

[62] IPCB (2004b).

[63] See the Statement of Tebtebba Foundation. This was presented at Working Group 2: Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, in the Conference of Parties Sixth Meeting (COP6), The Hague. 7-9 April 2002.

sovereignties, therefore making decisions on equitable sharing of benefits necessarily between contracting States rather than Indigenous and traditional communities.[64]

2. Genetic Resources and National Resources: *Res communis*

The CBD provides potential justification for recognition of the traditional use of genetic resources in the sustainable preservation of biological diversity. Article 10(c) obliges each contracting party, as far as possible and appropriate, to "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements." However, as discussed, this acknowledgment is tempered by the deference to national sovereignty, generating great concern in many Indigenous and traditional groups. The CBD is a significant re-assertion of the sovereign rights of states over their biological resources (Articles 3 and 15), in the context of the globalisation of resources (and thereby exposure to privatisation through intellectual property creation) that is favoured in TRIPS, and this is indeed significant in the context of global ecological risk and the commercialisation of resources.

Furthermore, while the emphasis on equitable sharing of benefits is repeated throughout the Agreement, elsewhere the recipient of that benefit remains unclear, although it is primarily the State as contracting party to which the benefits accrue. Therefore, the CBD falls short of recognising customary law and community in any real way other than as an aspiration of the contracting parties when reaching bioprospecting and benefit-sharing agreements.

The CBD establishes access to the biological resources of developing countries on a quid pro quo basis with technology transfer from the industrialised countries. In

[64] Aguilar (2003): 175-183.

Article 16, and in particular paragraph 5, the CBD asserts that intellectual property rights must not conflict with the conservation and sustainable use of biodiversity; although as will be discussed, the potential conflict or relationship between TRIPS and the CBD is the subject of current debate. Articles 17(2) (Exchange of Information) and 18(4) (Technical and Scientific Cooperation) include similar encouragement for the exchange and use of Indigenous and traditional knowledge and technologies, in the spirit of the CBD, although such assurances have been treated with cynicism.[65]

Access agreements[66] are provided for under Article 15 (Access to Genetic Resources). Article 15(4) states that "Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article," while Article 15(5) states the necessity for "prior informed consent." This requirement for prior informed consent has proven to be one of the most important effects of the CBD and has appeared as a key provision in the more commendable examples of legislative responses to the document.[67] However, as mentioned earlier, the response in developed countries has been largely disappointing to Indigenous and traditional groups.[68] More recently, efforts to concretise obligations to the free and prior informed consent of communities have gone unrealised,[69] sustaining the commitment to a nationalised agency with respect to resources as distinct from community autonomy. The principle of consent

[65] Frow (1997).

[66] See the more detailed discussion below.

[67] De Carvalho (2000); Fourmile (1998).

[68] For example, Australia's implementation of the CBD into Australian law in the form of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) has been criticised as a missed opportunity with respect to the CBD's position in relation to the recognition and protection of Indigenous cultural and intellectual property: Davis (1999): 4; Keyes (1999). As discussed earlier, the United States has continued to refuse to ratify the CBD.

[69] See the Statement of Tebtebba Foundation (2002).

on behalf of the communities themselves, developed in detail later, is a critical means by which to recognise community autonomy and to realise customary relationships in community resources. It will become clear that this is a crucial development in the concept of community resources towards achieving relevant and appropriate protection of traditional knowledge, not only in biological resources but in the diversity of community resources.

3. The Ideal Indigene?

The provisions of the CBD, and in particular Article 8(j), have also been criticised as idealising traditional lifestyles and romanticising or essentialising Indigenous peoples:

> Art 8(j) has been subjected to considerable criticism by indigenous peoples. It has been noted, for example, that the phrase "embodying traditional lifestyles" suggests that this provision applies only to "indigenous people who are isolated, fossilised in some cultural timewarp living in a never changing present", and excludes peoples who have "adapted their lifestyles to reflect the contemporary and continuing colonial situation in which [they] find [themselves]."[70]

The emphasis on *in situ* conservation has been questioned for its simultaneous emphasis on protection of the tangible physical area at the possible expense of protection of the lifestyle and traditional exploitation of resources in that area:[71] "Conserved wilderness is the other face of rampant, urban, industrial growth."[72] This emphasis on connection to place betrays a self-conscious characterisation of community according to classical anthropological and historical criteria,[73] a concern re-visited in discussions on rights to land, in the following chapter. Place becomes the

[70] The International Alliance of the Indigenous Peoples of the Tropical Forests (1996): 733. Also cited in Pritchard & Heindow-Dolman (1998): 38.

[71] The International Alliance of the Indigenous Peoples of the Tropical Forests (1996): 733; Pritchard & Heindow-Dolman (1998). See also the discussion of the in situ conservation system, and the need for off-reserve management, in Farrier (1996).

[72] Salleh (1996): 27.

[73] See the classical distinction between community and society in Tönnies (1957).

object of protection, the actualisation of the information. This conceptualisation denies the authority of dislocated and alienated communities with respect to particular areas, according to western models of physical dominion over place. The CBD remains concerned with geo-historical areas rather than the persistence of community relationships to resources, notwithstanding loss of place and alienation through the forces of colonisation. Arguably, an important opportunity for protection of biodiversity through a commitment to cultural diversity is eluded.

4. Softly softly: the rhetoric of the CBD

As well as an apparent deference to the dominant legal system, the CBD has been criticised for its soft language.[74] Despite this, parties remain under obligations to implement the general provisions.[75] Indeed, the strength of the CBD, and of Art 8(j) in particular, is the affirmation of rights in knowledge otherwise outside the ambit of intellectual property regimes.[76] As the discussion in the previous chapters has shown, not only are community resources conceptually outside conventional regimes, but also conventional regimes may be completely inaccessible to traditional and Indigenous communities:

> The securing and enforcement of intellectual property rights can often be prohibitively expensive … To the costs of registration must be added the costs of infringement actions and of opposition proceedings, which can also exceed Aus $100 000. These actions tend to be complex and time-consuming, and well beyond the means of indigenous peoples.[77]

The most significant aspect of the emphasis on community control is the recognition of the Indigenous and traditional community's cultural or internal self-determination[78]

[74] Fourmile (1999): 229.

[75] Fourmile (1999): 229.

[76] Dutfield (2000): 35-37.

[77] Blakeney (1997): 300.

[78] See the concept of internal self-determination explored in more detail in Chapter 8.

with respect to customary control over traditional resources, even if this emphasis has not been realised to an adequate extent in national implementation:

> [I]ndigenous peoples and their leaders actively demand recognition of the value of their customary practices, self-determination, and the capacity to share in the benefits of the exploitation of customary natural/cultural resources … amongst other "rights".[79]

Rather than attempting to conceal Indigenous rights to traditional knowledge and resources within an entitlement-based western conception of intellectual property rights, the CBD and commentators on the field have noted that an autonomy-based justification for resource rights of Indigenous communities places the right to self-determination within the community rather than a mere proprietary right in genetic resources.[80] This *sui generis* resource right would create a relationship between the interest in biodiversity and the Indigenous or traditional control of resources necessary to the protection of cultural diversity.

In accordance with this approach, the significance of agreements must be examined, while maintaining an awareness of the potential for imbalances in negotiating power between groups. In particular, further definition of the *sui generis* right in Indigenous and traditional resources and knowledge would be necessary to any legislative clarification and protection of the interests of these communities: "Concepts such as 'community rights', 'indigenous knowledge', 'local knowledge', and 'traditional resource rights' will have to be defined with more precision and at least to some extent harmonised."[81] This harmonisation could be achieved through the concept of

[79] Sutherland (1995b): 40; Fourmile (1999): 239; Hyndman (1994).

[80] Stenson & Gray (1999).

[81] Drahos (2000): 247.

community resources, and the international application of the principles developed in Chapter 9.[82]

5. Trading places: Nationalisation of the Global

While concerns with the subjection of communities to national "interests" remain, the re-assertion of national sovereignty in contrast to the emphasis on international or global trade that is encouraged by TRIPS is nevertheless important in the context of earlier discussions of global intellectual property rights and developing countries. The complex question of traditional knowledge, and indeed community resources, however, is of course not answered by a simple reversal of the national/international paradigm. Indeed this emphasis on state sovereignty risks generalising diversity in cultural interests and ultimately undermining the biodiversity that could be enriched and protected through the preservation of cultural diversity and Indigenous and traditional cultures:

> The problem of exclusive state sovereignty is the most critical in the Convention, because unless it is interpreted in a positive manner, which represents indigenous peoples' rights, it stands to undermine the very cultural diversity with which biological diversity closely relates.[83]

This critical relationship between national sovereignties and communities, particularly with respect to access and benefit-sharing, was a significant concern of the 7th Meeting of the Conference of the Parties to the Convention on Biological Diversity (COP7).[84] This relationship also implicitly informs the Doha mandate to review the relationship between intellectual property and biodiversity, through the interaction of

[82] See also the consideration of harmonisation with respect to human rights and community, and the concept of the "universal community" in Hardt & Negri (2000).

[83] International Alliance of the Indigenous Peoples of the Tropical Forests (1996): 733.

[84] Held in Kuala Lumpur 9-20 February 2004. All COP7 Decisions are available at http://www.biodiv.org/doc/decisions/cop-07-dec-en.pdf

the key international agreements. Indeed, the Doha Declaration presents a possibly critical turn which informs the present debate.

Cultural Prospecting and the Consumption of Community

1. The Doha Mandate

The Doha Declaration of 2001 includes an instruction to the TRIPS Council to consider the relationship between TRIPS and the CBD and the issue of traditional knowledge, particularly in relation to bio-piracy and the patenting of biotechnology.[85] The Declaration also instructs the TRIPS Council to examine the protection of traditional knowledge in the context of this review, in relation to biotechnology (TRIPS Article 27.3 (b)), and with regard to the particular interests of developing countries.

Doha is a technical mandate that requires review (not necessarily amendment) of TRIPS within the existing international framework. The TRIPS Agreement leaves to the discretion of member states the treatment of the patenting of plant and animal materials in Article 27.3(b).[86] In contrast, the CBD, as discussed, represents an affirmation of state sovereignty over native biological resources, giving the state authority to determine the rules governing principles of prior informed consent, mutually agreed terms, and equitable sharing with respect to the use of traditional knowledge and resources.

Since the Doha Declaration, there is increased political pressure to conduct a review of obligations to protect traditional knowledge and the patenting of genetic resources. Chapter 4 considered the discussions in the WIPO IGC and the work of specific task

[85] WT/MIN(01)/DEC/1 (20 November 2001): Paragraph 19.

[86] While Article 27.3(b) became due for review in 1999, as required by the agreement itself in Article 27.3(b), this process is yet to gain momentum.

forces that have motivated changes, including those to the system of International Patent Classification (IPC) to include a new category of information in traditional knowledge, specifically traditional medicine based upon plants. In this context, enhanced documentation of traditional knowledge is argued to be important to provide searchable prior art for the purposes of the Patent Cooperation Treaty (PCT).[87] As discussed in Chapter 4, defensive mechanisms, including the disclosure of the origins of traditional knowledge from which patentable material has been developed, will be a substantial subject for discussion in the forthcoming Seventh Session of the IGC.[88]

Of further interest in this context is the study[89] jointly commissioned by WIPO and the UNEP and presented at COP7. The study calls for, amongst other recommendations, an international system for access and benefit-sharing which

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[87] WIPO International Patent Cooperation Union (PCT Union), Meeting of the International Authorities Under the PCT. Ninth Session, Geneva, July 21 to 25, 2003. "PCT Minimum Documentation." Prepared by the International Bureau, 2 July 2003. PCT/MIA/9/4.

[88] See the discussions of defensive mechanisms in Chapter 4. This move towards disclosure may confront significant opposition by members of the WTO. The proposal to name traditional sources was the only provision rejected in the conclusion of the European Directive on the Legal Protection of Biotechnological Inventions, 99/44/EC, at http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_213/l_21319980730en00130021.pdf. This Directive has been criticised as a licence to plunder traditional communities: GRAIN (1998). See also the discussion of this Directive in documents submitted by the European Community and its member states to the Third Session of the WIPO IGC in WIPO/GRTKF/IC/3/16 (14 June 2002).

> The preamble to the EU legislation on the legal protection of biotechnological inventions lays down that, if an invention is based on biological material of plant or animal origin, or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents. This provision must be regarded as being an encouragement to mention the geographical origin of biological material in the patent application, along the lines indicated by Articles 16(5) and 11 of the CBD. However, the provision of such information is not an obligation under EU law. Nor does the failure to provide such information have, as such, any legal consequence for the processing of patent applications, nor for the validity of rights arising from granted patents. (Annex, p 4).

[89] Gupta (2004). The study, "The Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Traditional Knowledge," was jointly commissioned by WIPO and UNEP. References in the present discussion are to the pre-publication version for the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity Kuala Lumpur, February 9 to 20, 2004.

provides for a mix of incentives related to traditional knowledge, of which intellectual property protection may be just one element. This is significant in moving towards an appreciation of the diverse interests suggested by traditional knowledge protection, for which summarisation within intellectual property may be inadequate, but for which co-existing rights to intellectual property may continue to be relevant. Further, the Kuala Lumpur Declaration of COP7 reaffirms the role of Indigenous and local communities in the conservation and sustainable use of biological resources and the development of an international regime on access and benefit sharing towards community development,[90] confirming the basis for developing systems of community consent with respect to local use of resources.

In order to understand the international intellectual property issues raised by the Doha Mandate and the subject of current discussions, particularly in respect of traditional knowledge and biodiversity, it is necessary to address the relationship between the CBD and TRIPS, and the specific tensions that arise between these documents and the obligations they create in member countries.

2. TRIPS and the CBD: Partner or Perish?

The impact of TRIPS and the CBD is complicated by the apparently conflicting relationship between these two international instruments, motivating the mandate in the Doha Declaration to review this conflict.

The TRIPS Agreement recognises private monopoly rights in intellectual property, and in particular, imposes significant obligations on contracting parties to provide

[90] The Kuala Lumpur Declaration. http://www.biodiv.org/doc/ref/cop-07/cop-07-md-01-en.pdf

patent protection in all fields of technology,[91] provoking important legal and cultural issues with regard to bio-prospecting. In contrast, the CBD potentially recognises community control of genetic resources and the rights of Indigenous communities to fair and equitable benefits in the harvesting of genetic resources from biodiversity rich regions.

Notwithstanding the limitations described earlier, the importance of the CBD in creating protection for traditional ecological knowledge against the threat of bio-prospecting is found in the unique relationship between cultural diversity and biodiversity and a paradigmatic shift, where customary law is a necessary means by which to preserve intellectual interests through biological diversity. Despite the limitations discussed, the CBD provides a significant international framework for potential legislative recognition of Indigenous interests, in the implementation of *sui generis* legislation which must articulate a new conceptual language for dealing with such interests. Such legislation would effectively codify the kinds of traditional values inherent in those resources, but would nevertheless raise other problems in its application.

2.1 The CBD: Domesticating TRIPS

The CBD was entered into some months before TRIPS and its relationship to TRIPS is somewhat uncertain or indeed even inconsistent. As discussed, TRIPS effectively controls the global distribution of information (including that embodied in biological material) through the system of intellectual property rights and international trade.[92] In

[91] According to the criteria of newness (novelty), nonobviousness or involving an inventive step (inventiveness), and industrial applicability or utility. Article 27(1). Again, these criteria can be related to, or summarised by, the concepts of origination and in-imitativeness established earlier.

[92] See the discussion of the impact of TRIPS on global information flows in Drahos (1995); and also Boyle (1997).

understanding the "components" of biological diversity to present another "resource" or good, the interpretation of the management of those resources is appropriated by the discourse of information, goods, and the grand narrative of innovation. As will be shown, the construction of biodiversity in the CBD in terms of components also problematically facilitates the ongoing separation of environmental "goods" (resources) and community.

TRIPS has been criticised as internationalising the objectives of developed, industrialised western countries (as these become the dominant, "summarising" definition for trade objectives) and attending assumptions of the social and economic dimensions of intellectual property rights. As discussed, the economic globalisation of intellectual property rights advocated in TRIPS is seen as a threat to Indigenous and traditional communities, compromising the relationship between cultural and biological diversity: "Indigenous culture is, in many ways, at odds with the global politico-economic system. Numerous critics argue that the spread of western capitalist culture has led to the simultaneous erosion of both biological and cultural diversity."[93]

In particular, serious questions have been raised as to the patent obligations imposed by TRIPS on developing countries:

> Much of the commentary on the GATT round is cast in terms of calculations of the losses incurred by the Western information industries as a result of "piracy" and "theft"; but these calculations rarely attempt to get to grips with the conflict of definitions of what should count as "property" in the first place … and their bland assurances that subscription to an international intellectual property regime will in the long term bring about technology transfer and thus a decreased dependency of the "developing" on the "developed" nations ring hollow in the light of the way the GATT regime has "neatly and disturbingly divided developed countries, who are major net exporters of intellectual property rights, from the LDCs which are net importers." There is no

[93] Mulligan (1999): 47. The possible homogenising of culture through market-based regimes for innovation and creativity was discussed earlier, particularly in Chapters 2 and 3.

> "accumulation of knowledge capital" when use of that capital is carefully controlled by monopoly rents.[94]

Within its emphasis on trade and an economic model of rights in intellectual property, TRIPS stipulates patents on micro-organisms and plant varieties,[95] but allows for the exclusion of patents on plants and animals. However, the application of this exclusion is at the discretion of the signatories.

Counter to the global access argument that facilitates private exploitation of traditional knowledge as a public resource, as *res communis*, the CBD presents international support for the protection of traditional resources from exploitation (whether or not intellectual property regimes are the appropriate means), while creating legal and financial incentives for the conservation of these precious biological and cultural resources. However, this potential is problematically compromised by the recuperation of those resources as *res communis* through the supremacy of national sovereignty.

Notwithstanding the significant limitations, in contrast to the monopolies that are protected in the international intellectual property framework supported by TRIPS, the provisions of the CBD provide a framework for communal custodianship and benefit-sharing, emphasising effective local autonomy, suggesting nevertheless the involvement of communities in the application of equitable principles to resource use. By approaching the protection of biological diversity through mechanisms of cultural integrity and necessarily diversity, as discussed, the CBD promotes an important transformation in the consideration of the local community as a legal actor in a global

[94] Frow (1997): 191-192 quoting Kostecki MM (1991): 273.

[95] Plant varieties must be protected by either patents or *sui generis* (for instance, consistent with the International Union for the Protection of New Varieties of Plants (UPOV)), or a combination of both, under Article 27(3)(b). This causes great concern for Indigenous and traditional peoples.

context. The CBD therefore is itself an important "localising" perspective in the context of globalised monopoly rights emphasised in TRIPS. This production of the local, however, must necessarily occur through the international order, and not be rendered subject to the discretion of signatories. How then might this "collective" interest suggested by the CBD be deployed to actualise community autonomy with respect to resources? How might international biodiversity protection politicise community?

2.2 The Communal is Political

TRIPS has also been criticised for reinforcing private monopoly rights and privileging industrial innovations over informal, communal innovations,[96] whereas the CBD goes towards recognising a collective, or national interest, and at least acknowledging communities:

> One of the main objectives of the Uruguay Round of the GATT was the extension of patent enforcement to certain key industries such as pharmaceuticals and agrochemicals which in many countries were exempt from patent protection. These are industries whose products – medicine and food – force in a particularly direct manner the issue of a conflict between "social" and "private" interests.[97]

Where the TRIPS Agreement is potentially significant as well as the cause of greatest concern for Indigenous people is Article 27(3), which refers to subject matter that may be excluded from patentability[98] and also raises the potential for introducing *sui generis* systems for protection for plant varieties. While TRIPS and the CBD both emphasise protection of the biotechnology industries, this agenda is explicit in TRIPS

[96] Sutherland (1995a): 37; Sutherland J (1998b): 293-95.

[97] Frow (1997): 192.

[98] See also the exceptions set out in Articles 52(4) (Patentable Inventions) and 53(b) (Exceptions to Patentability) of the European Patent Convention.

through the obligation upon signatories to protect biological inventions, subject to the exclusions in Article 27(3)(b):

> Perhaps one of the most significant problems in these discussions is the contradiction between the Convention on Biological Diversity (CBD) which recognized the sovereign right of States (local communities) over their biological diversity and TRIPs which confers monopoly rights through IPRs (Article 27.3[b]). The definitional constructs of this Article preclude recognition of technologies, innovations and practices of local communities and their collective ownership for common social good. The obvious implication is that the creativity of local communities as represented by indigenous peoples cannot be protected and rewarded.[99]

Also of interest is Article 27(2), which allows for exclusion from patentability on the basis of *ordre public* or morality, where the commercial exploitation within the territory may be contrary to *ordre public* or morality of the contracting state concerned.[100] However, its efficacy remains unclear, particularly with respect to Indigenous and traditional communities, given its territorial limitations and construal of risk according to commercial exploitation rather than risk inhering in the invention itself.[101] While early drafts of this provision understood the exclusion to be inherent in the invention itself, the exclusion operates in the final provision according to its commercialisation alone. Thus, the exclusion has no application to the question as to whether a patent is granted. The concept of *ordre public*, therefore, has no impact upon the construction of knowledge as commodifiable and patentable information, merely on the "use" of that commodity. The ongoing "remunerative" model of the relationship between community and resources persists.

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[99] Ekpere (2000): 1.

[100] Note the limitation (commercial exploitation) of the final Agreement, compared to the exclusion based on any exploitation or publication, as it appeared in the Brussels Draft of the Agreement. See the discussion in Gervais (2003b): 222.

[101] Gervais explains, "the risk must come from not from the invention as such, but from its commercial exploitation and the impact that can be invoked is only within the territory of the country concerned." (2003b): 222.

Nevertheless, it may be possible to imagine the application of this exclusion to material derived from traditional knowledge or where patentability of certain material may be deemed contrary to human life or health or may prejudice the environment.[102] The exclusion would arguably be possible only through revocation, rather than at the examination stage, given that it could not necessarily be based on particular material but upon the ethical derivation of the patentable subject matter. This would suggest rather complex obstacles to the application of Article 27(2) to the present problems, and the Article remains largely unconsidered by domestic implementation of TRIPS as well as completely discretionary at the national level.[103] Thus, the potential for its impact upon the concerns of traditional knowledge protection are questionable and probably aspirational at best.[104]

Despite this potential for defensive adaptation of international standards of patent law, through the application of exclusions to patentability, the CBD, in concert with TRIPS, emphasises intellectual property laws within which protection of Indigenous and traditional knowledge would conform, or at least, remain "subject to" in the context of international trade. While the explicit acknowledgment of Indigenous and traditional communities in the CBD remains important here, the concerns regarding the deferral of authority over local resources to the "national sovereignty" persist:

> While the CBD does provide a potentially useful opportunity for countries to introduce new measures recognising and protecting indigenous knowledge and innovations, it also imposes some constraints. The requirement that implementation of art 8(j) should be subject to national legislation may be problematic for indigenous peoples, especially if existing national laws take

[102] For instance, see the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, 30 August 2003. WT/L/540.

[103] For a more detailed consideration of the limitations of Article 27(2), see Beyleveld et al (2000).

[104] For a discussion of these issues in the New Zealand context, see Young (2001) for an examination of the possibility of excluding Maori traditional medicine from patentability, pursuant to the morality exclusion as implemented in the New Zealand Patents Act 1953, s 17(1).

> precedence, where these might contradict or place limitations on any measures introduced under art 8(j). The CBD encourages but does not oblige countries to respect and preserve indigenous knowledge. It does, however, provide an opportunity, if used appropriately, for countries to introduce special national laws beneficial for the protection and conservation of indigenous knowledge, traditions, innovations and practices.[105]

Although the CBD provides a framework for potentially more appropriate legislative recognition of traditional knowledge (or at least traditional ecological knowledge), concentrating purely on the paradigm of community versus monopoly rights (imposed and sustained by the ongoing constraint of the debate within an intellectual property perspective) is simplistic and damaging. The summarisation of interests according to this dichotomy continues the classical socio-anthropological opposition[106] of community (as organic, pre-modern, nostalgic ideal) against society (as impersonal, industrialised, civilisation), and tradition against innovation, not only neglecting the importance of access to commercialisation on the part of communities, but also problematically justifying the appropriation of resources as *res communis*. Despite the movement towards recognition of traditional knowledge within intellectual property laws, the politicisation of community in resources is eluded.

While traditional knowledge production should not necessarily be completely defined by the private monopoly rights paramount in western law and central to the minimum requirements of TRIPS, this must be understood as other than a simple opposition to these monopoly rights and must acknowledge access of communities to the political, social, and economic sphere. Beyond simple communal property rights, rights in traditional knowledge, as maintained from the outset of this work, are vested in the practice of the culture and integrity of the individual as well as the differentiation and

[105] Davis (1999): 3.

[106] Tönnies (1957).

continuation of the community, rather than inhering in the products themselves as objects of proprietary exchange. Commercialisation of traditional knowledge is not ruled out by community resources, but must occur according to community custom and consent.

While the possible distraction of this opposition between community and individual rights persists, the complication should be the dismantling of the dominant subject/object, knowledge/information models that perpetuate a separation between the origins of knowledge (whether communal or individual) and the circulation of that knowledge as information. The emphasis on the products alone is raised as a key concern by Indigenous and traditional groups, particularly with respect to natural resources.[107]

As considered in earlier discussions and relevant to the present discussion, the right to traditional medicines, medical practices, and agricultural knowledge is not simply and merely a general and collective right within the community that may be wholly captured by models of remuneration and benefit-sharing, where those resources continue to be construed as *res communis*, thus legitimating appropriation through remunerative models without giving effect to community autonomy and the relationship between community and resources. In those discussions, it was noted that the motivation or basis for that remuneration is not clear in the text of the CBD, although possibly implied is custodianship of resources (of story and tradition) approximating recognition of the community resources relationship that is infrequently realised in actual contractual practices between states. Indeed, to simplify

[107] See the discussion of the term "traditional resources" and the work of Dutfield and Posey in the Introduction. The term is defined at http://users.ox.ac.uk/~wgtrr/trr.htm

community as "collective" (as is often the case[108]) is to silence the political and cultural particularities of traditional and Indigenous community structures, indicating the critical importance and relevant and appropriate procedures of free and prior informed consent of communities. With such consent, the process of benefit-sharing may have real and significant relevance and application for the concept of community resources.

Despite the criticism in this discussion, particularly of the possible simplification of the community/resources relationship, the CBD offers potential disruptions to the dominant model of separation of natural resources and cultural knowledge.[109] Even if those "minor" interruptions are not adequately realised in the implementation, they present important elements towards the development of the concept of community resources in this work. In particular, the CBD does not attempt to conceal rights to traditional knowledge and resources within an entitlement-based western conception of intellectual property rights and innovation. Rather, the CBD provides an autonomy-based justification for rights to resources within the community, as distinct from a right to property in genetic resources, even if this justification is aspirational at best.[110] This creates a relationship between the interest in biodiversity and the traditional control of resources necessary to the protection of cultural diversity. In

[108] See for instance Zygmunt Bauman's concern that community presents a trade-off, ceding individuality for security: Bauman (2001a). However, it should be noted that this problem arises particularly where community is generalised to cover all sorts of examples of people coming together, rather than in the particular political and cultural sense of the traditional and Indigenous community. As considered in Chapter 1, notions of history and time are critical in this respect.

[109] This separation of subject / nature / information is a preoccupation of Western legal systems that is examined further in the next chapter in the context of rights to land, and the resistance of the courts to recognising cultural knowledge in land rights.

[110] See further the discussion of autonomy-based rights to resources in Stenson & Gray (1999), where the authors argue for an autonomy theory of community rights (rather than one based on entitlement), where culture (including through meaningful access to resources) is the critical means by which to assert identity (183-85).

accordance with this approach, the significance of agreements must be examined, while maintaining an awareness of the potential for imbalances in negotiating power between groups.

3. Community Management of "Global" Resources

The exploitation of traditional resources, and the alienation of such products from the particular Indigenous or traditional community and the cultural context in which those resources subsist, has continued since the times of colonial expansion:

> [R]etrospective assessments of the economic and social consequences of the "Columbian exchange" have been particularly important in recent decades for supporting arguments in favour of national sovereignty over genetic resources and the development of benefit-sharing arrangements with the suppliers of commercially useful biological resources.[111]

It is the cultural and customary investment, rather than the commercial, that Doha calls for review, together with the significant issue of access to the benefits of that biotechnology, particular in the area of medicine.

3.1 Agreements and Consent: A Critical Turn

The relationship between substantiating the principle of self-determination with respect to the cultural significance of traditional resources, and the ability to administer those resources, is currently suggested by some as being best supported by the practice of bio-prospecting agreements.[112] Such agreements are made in the context of international environmental and intellectual property standards whereby Indigenous and traditional peoples are able to share equitably in the benefits derived from their traditional knowledge, resource management, and practices, while encouraging the preservation of biodiversity and environmental resources.[113]

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[111] Sutherland (1995b): 41.

[112] Sutherland (1998a): 13.

[113] Oddie (1998): 9; Sutherland (1995a); Indígena & Kothari (1997); Jones JS (1998).

> [L]icensing agreements established early in the ethnobotanical bioprospecting activities, that draw upon traditional knowledge and biological resources, can be used as a mechanism for benefit sharing where such activities result in a patentable invention such as a new pharmaceutical or agricultural crop.[114]

Nevertheless, licensing agreements are not unproblematic in their application,[115] and the problems and limitations of such agreements have been raised in the WIPO-UNEP Study presented to COP7.[116]

First, the authority of community in respect of obtaining such agreements is in doubt under the CBD,[117] and derives no authority from international law, where such groups are unlikely to be granted legal standing with respect to the resources in question. There is no formal requirement for community consent, and so the community is merely peripheral to the contractual activity between nation-states. Second, the practice of bio-prospecting agreements emphasises the notion of natural resources as commodities of trade and removes the emphasis from the protection of the knowledge or tradition embodied in those resources to that of commodities upon which to trade. Third, there is criticism of the process of "compensation" for loss, or "remuneration" for naturally occurring resources, *res communis*. Even where such remuneration is considered appropriate, the process by which to arrive at an adequate representation of that value remains a problematic exercise. As Macmillan points out, nowhere is the language of benefit-sharing defined in the CBD.[118] Arguably, the value is in the

[114] Department of Foreign Affairs and Trade, "Traditional Knowledge," http://www.dfat.gov.au/ip/traditional_knowledge.html (25/09/01).

[115] Roht-Arriaza (1996): 956-957.

[116] Gupta (2004).

[117] While the CBD requires for prior informed consent in Article 15 Paragraph 5, with respect to access to resources, this is on the part of the contracting party, and is silent on local and Indigenous communities. For a useful discussion of the relationship between this requirement of consent (and disclosure) in the CBD and patentability under TRIPS, see De Carvalho (2000). See also the discussion in Eugui (2003).

[118] Macmillan (2001): 125.

modification and commercialisation of those resources, and therefore unlikely to be reflected in the original bio-prospecting agreement.[119]

Finally and fundamentally, also in doubt within current frameworks is the very legitimacy of the community claim to those resources, doubt that is exacerbated by the ongoing construction of those resources as *res communis*. Despite this, it is widely acknowledged that in harvesting and modifying those resources, a necessary starting point often requires a direct utilisation of Indigenous or traditional knowledge,[120] and custodianship of that knowledge is implicit in the recognition of knowledge as traditional. The rendering of the biological resource as an object of intellectual property (the appropriation of *res communis*), however, is very limiting to the effort to realise what are not only biological resources, but also frequently cultural resources. The motivation for the desirability of acknowledging and remunerating community, as identified earlier, is never made clear.

3.2 Free and Prior Informed Consent

Free and prior informed consent has emerged as a fundamental basis upon which to realise community autonomy with respect to not only natural and biological resources, but also other forms of cultural knowledge.[121] As well as appearing as a key concern in numerous international declarations, statements, and other documents of

[119] Goldman (1994): 714-718. This article maintains a commitment to traditional intellectual property law paradigms and fails to recognise the fundamental shift that might be available to protect Indigenous traditional resource rights, through a positive reading of the CBD. See also *Moore v Regents of University of California* 271 Cal. Rptr. 146 at 147-49, where it was held that there no property rights existed in discarded personal body tissue used subsequently to develop a permanent cell line for supply to genetic engineering companies.

[120] Yano (1993): 449-50.

[121] Ideally this distinction it would not be necessary to clarify this, given the frequent irrelevance of this distinction to Indigenous and traditional groups, in view of the inextricable interrelationships recognised throughout this work and considered further in the next chapter, between community and resources (as knowledge, as territory, as Land). See the Preamble and Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples, discussed in more detail below.

Indigenous and traditional peoples,[122] the requirement of prior informed consent of Indigenous and traditional communities operates in various national laws dealing with biodiversity and community knowledge,[123] and examples of its influence in the voluntary codes of conduct of some groups are also available.[124]

A significant example of the importance of consent is provided by the United Nations Draft Declaration on the Rights of Indigenous Peoples (1993),[125] and is incorporated into several Articles.[126] The Declaration of Principles of the World Council of

[122] An extremely useful overview of 15 international declarations and statements is provided in Dutfield (2002). In this survey Dutfield reviews these documents for indications of ownership, prior informed consent, participation, right to veto research, bioprospecting, disclosure, benefit-sharing and compensation, restitution, and research codes of ethics. Other important examples include the Kari-Oca Declaration and the Indigenous Peoples' Earth Charter (1992).

[123] Significant examples include Costa Rica Ley de Biodiversidad (1998 7788, in force), discussed in more detail below; Brazil (Provisional Measure No 2.186-16 of 23 Aug 2001); Organisation of African Unity (OAU) African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000, formally endorsed and recommended by all African Heads of State); ASEAN Framework Agreement on Access to Biological and Genetic Resources (2000 Draft); Bangladesh Biodiversity and Community Knowledge Protection Act (1998 Draft); India Model Biodiversity Related Community Intellectual Rights Act (1994 NGO Proposal), however the India Biological Diversity Act (2002, in force) does not refer to consent of communities; Pacific Forum Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices (2001, Draft); Pakistan Legislation on Access to Biological Resources and Community Resources (undated, Draft); Philippines Community Intellectual Rights Protection Act (2001, Draft), Guidelines on Prospecting (1995, in force), Implementing Rules and Regulations on the Prospecting of Biological and Genetic Resources (1996, in force), and Republic Act No 8371, An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/ Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes

[124] See for instance, the documents of the National Innovation Foundation (NIF), Department of Science and Technology, Government of India. The NIF was established in 2000 "as an autonomous society to recognize and promote grassroots innovations and traditional knowledge of individuals/communities" (From the "Prior Informed Consent Form: Traditional Knowledge.").

[125] UN Work leading to the UN Draft Declaration on the Rights of Indigenous Peoples was commenced in 1977, with a Working Group on Indigenous Populations of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission is considered further in Chapter 8) established in 1982. The drafting of the declaration commenced in 1985 and was adopted by the UN Sub-Commission in 1994 (36th Meeting, 26 August 1994), after which it was submitted to the Commission on Human Rights (51st Session). Since then the draft has been subjected to an open-ended inter-sessional working group, and no final form has been reached.

[126] Articles 10 (removal from land and territories), 12 (cultural traditions and customs), 20 (participation in law-making), 27 (restitution), 30 (development and use of land, territories, and other resources).

Indigenous Peoples (1984)[127] also emphasises consent in respect of "inalienable rights over their traditional lands and over the use of their natural resources" in Paragraph 10.[128] Of special interest in the context of customary management of biodiversity, and the relevance of traditional ecological knowledge, the Charter of the Indigenous and Tribal Peoples of the Tropical Forests (IAIP Charter)[129] calls for consent with respect to programmes of biodiversity.[130]

The Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (1995),[131] revised in 2000,[132] refer to free and informed consent throughout. Of particular significance is the negotiation of the relationship between requirements for free and informed consent and national laws within the document.[133] This includes the call for invalidation of intellectual property protection if free and informed consent cannot be shown[134] and the requirement of attributions (including trade marks

[127] The World Council of Indigenous Peoples was formed in 1975 during an international conference of Indigenous peoples, staged in British Columbia, Canada. The Declaration of Principles was ratified at the 4th General Assembly of the World Council of Indigenous Peoples in Panama, September 1984.

[128] See also Paragraph 13 in respect of the implementation of actions or process that may lead to the destruction of the environment, indicating the relevance and importance of Indigenous practices of sustainable use, and management of biodiversity.

[129] The IAIP Charter was adopted in Malaysia, 15 February 1992. The IAIP (International Alliance of Indigenous-Tribal Peoples of the Tropical Forests) is an international network, founded in 1992 at the same Conference at which the Charter was agreed. The IAIP is a partner of the Civil Society Organisations and Participation Programme (CSOPP) of the United Nations Development Programme (UNDP).

[130] Article 41. Free and informed consent is an important principle throughout the Articles of the Charter.

[131] Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, UN.

[132] See the Report of the Seminar on the Draft Principles and Guidelines, 28 February – 1 March 2000, Geneva.

[133] Paragraph 23. See also paragraphs 24 (indigenous elders to guide judicial and administrative bodies) and 25 (identification of sacred and ceremonial sites).

[134] Paragraph 23(c).

or appellations of origin) where appropriate and authorised by the peoples or communities concerned.[135]

3.3 Claiming community

Despite the prevalence of consent in other international documents, the CBD is disappointing to communities, as has been discussed. Nevertheless, while the provisions of the CBD appear to put aside or even suspend the claims of communities to share in benefits derived, the text nevertheless implies some basic aspects of community resources upon which to build protection (incorporating consent) for the purposes of the model to be proposed.[136] Significantly, the priority of tradition, of story, and the narration of community developed earlier in this work as the stability and source of legitimacy of the claim of community resources, is implied in Article 8(j), which refers to the aim to:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge,

Furthermore, the call to seek "the approval and involvement of the holders of such knowledge" introduces the relevance of consent by the importance of ongoing community governance and involvement with respect to resource management. Free and prior informed consent provides for communities to act in accordance with responsibilities to tradition and to narration of identity, including access and appropriate management of the means for that narration that are comprised in the

[135] Paragraph 23(d).

[136] The principle of free and prior informed consent is discussed further in Chapter 9, in the context of the model presented.

natural resources of community.[137] As discussed, this responsibility to story and the narration and self-expression of community is fundamental to community autonomy. It is through this narration of story that responsibilities to tradition are expressed, the integrity of community upheld, and indeed the "self" of community is "determined." Consent is critical to this autonomous expression and self-determination of community and the greater and lesser degrees to which genuine community consent is achieved, characterising the cultural relevance of the CBD to Indigenous and traditional communities. Indeed, this is seen in what may be described as one of the most historically important political transformations in resource management, in the case of INBio.

3.4 Biodiversity as a Cultural Resource: INBio

The ideology of biological resources as a global commodity, that authorises the unfettered access of bio-prospectors, was famously rejected by Costa Rica in the 1980s. The creation of the Ministry of Natural Resources, Energy, and Mines (MIRENEM) in 1986 increased, at the parliamentary executive level, awareness of environmental concerns such that by the end of the 1980s, Costa Rica had ended the practice of allowing free and unlimited access to its wild genetic resources.[138] By Executive Decree No 19153, of June 5 1989, the Planning Commission for the Instituto Nacional de Biodiversidad (INBio) was established.[139] After recommendations to establish a state biodiversity institute were not realised, the members of the commission established INBio as a private non-profit national

[137] Considering rights to land, the following chapter will extend this notion of natural resources as part of the means of expression, of community resources, differentiating between physical resources of place and cultural contestation of space.

[138] Gámez et al (1993): 54-55.

[139] The Planning Commission was composed of representatives from governmental institutions, NGOs, and higher education. See the official site of INBio, www.inbio.ac.cr which also provides a list of the founding members.

biodiversity institute,[140] which received official backing from the government and continues to be supported. Using INBio as a means of regulating access, the government began negotiating bio-prospecting concessions in return for compensation.[141]

In 1991, a landmark agreement between INBio and the Merck pharmaceutical company attracted a great deal of attention.[142] In its payment of over $1 million and $130 000 of scientific equipment in consideration, as well as royalty payments calculated according to the type of genetic material, provided directly for conservation purposes,[143] this agreement represents an important departure from the common heritage of humankind argument, rendering the inequitable exploitation of the genetic resources of developing countries by multinational companies more difficult to sustain.

In the Merck-INBio Biosprospecting Agreement, Merck received samples, together with information regarding the traditional use of that material, in return for $1.35 million and an agreed royalty of between 2 and 3% of the drug value (estimated to earn over US$1 billion per year).[144] Despite this apparent return, many argue that the fracturing of the communal processes is initiated.[145] Furthermore, the sharing of

[140] INBio made recommendations to the Costa Rican government to establish a state biodiversity institute, but such a body was never established, motivating the members of the Planning Commission to create the private non-profit institute that is at work today. See the official site www.inbio.ac.cr

[141] Adair (1997): 142. INBio also works closely with the Sistema Nacional de Areas de Conservacion (SINAC), and in 1998, the INBio-SINAC Joint Program was established. Discussed below, Ley 7788 (Biodiversity Law) establishes national sovereignty over natural resources, responsibility vesting in the Nacional de Gestión de la Biodiversidad (National Commission for Biodiversity Management, CONAGEBIO), and SINAC.

[142] Adair (1997): 142. For a more detailed discussion of access agreements and contracts, see Laird (1993).

[143] Gámez et al (1993): 56-57.

[144] Blakeney (2002): 43.

[145] Alcorn (1995): 41.

benefits is with the national interest and not with the Indigenous community responsible for the traditional knowledge being exploited.[146] While the Merck-INBio arrangement reflected a national interest in the wild genetic resources of a developing country, it did not directly involve any Indigenous knowledge providers.[147]

The introduction of Ley de Biodiversidad (Biodiversity Law)[148] in 1998 was internationally momentous, but nevertheless established the state's "full and exclusive sovereignty over the components of biodiversity,"[149] providing the basis for the government to grant access to resources in Indigenous territories on public interest grounds, despite opposition from the community.[150] While the construction of biological resources is still that of a remunerative model of commercial exchange between contracting parties, it is arguable that key principles in the Costa Rican laws remain significant and useful in confronting the difficult issues in adequate protection of Indigenous and traditional cultural and intellectual property within a particular territory, including a developed country such as Australia. Ley 7788 requires prior informed consent on the authority of the Indigenous community where access to their territory is sought,[151] and provides for "The right of local communities and indigenous peoples to oppose any access to their resources and associated knowledge, be it for cultural, spiritual, social, economic, or other motives."[152] In 2003, Nomas de acceso a la biodiversidad (Decreto Ejeutivo No 31-514)[153] were introduced, the objectives of

[146] Gámez et al (1993).

[147] Davis (1999): 24.

[148] Ley 7788.

[149] Ley de Biodiversidad, Article 2 (Sovereignty).

[150] Aguilar (2003): 180.

[151] Article 65.

[152] Article 66.

[153] Rules on access to biodiversity (Presidential Decree No 31-514), December 2003.

which[154] include the regulation of access to biodiversity and related traditional knowledge,[155] the regulation of fair and equitable distribution of benefits[156] (social, environmental and economic) with special attention to local communities and Indigenous peoples, and the fostering and protection of *sui generis* communitarian intellectual property rights.[157]

Costa Rican law therefore recognises an entitlement, on the part of the people of a particular group, to their resources in the context of practising and continuing their knowledge. The granting by the government of access and use to Indigenous territories should follow free and prior informed consent of communities,[158] although the possibility of overruling that consent may apply.[159] On the basis of that prior informed consent, which would give effect to community autonomy and authority with respect to resources, access should be accompanied by adequate remuneration (ongoing, including the sharing of benefits) for such use.[160] It is in this way that some commentators suggest that appropriate bio-prospecting agreements represent the most effective way currently available to encourage conservation, facilitate research, and

[154] Set out in full in Article 1 (Objectives).

[155] Defined in Article 6(j) as "dynamic knowledge, which improves through constant innovation and experimentation. The traditional element refers to the way in which it is acquired, shared and utilized through a social learning process that is unique to each indigenous culture and local community."

[156] Defined in Article 6(m) as "Participation in the economic, environmental, scientific-technological, social or cultural benefits resulting from research, bioprospection or economic exploitation of the genetic and biochemical elements and resources of biodiversity among the parties involved in access and conservation of biochemical and genetic resources, with special attention to local communities and indigenous peoples."

[157] Defined in Article 6(l) as "Knowledge, practices and innovations of the indigenous people and local communities related to the use of the biodiversity elements and related knowledge."

[158] Article 9 of the Rules sets out in Part 3 the requirements of prior informed consent, which include provisions for studies on the cultural impact of access if required (Article 9.3(l)).

[159] Arguably, for the legitimacy of this law, and indeed for the model proposed in this work, the national interest may be an overarching consideration. However, concerns persist, and the model of community resources advocates international obligations to observe community resources, as an aspirational ideal at the very least, rather than subjecting them to national sovereignty.

[160] Aguilar (2003): 180-81. Aguilar recommends negotiation of ongoing sharing of benefits from the subsequent commercialisation of any products.

protect the resources of Indigenous and traditional communities,[161] although the concerns and problems persist.[162]

3.5 Collaborative models

Further to protecting the rights of Indigenous and traditional communities, codes of conduct or ethics for research and bio-prospecting are favoured by various professional organisations,[163] "and many of these organisations have been supportive of indigenous peoples' activities and aspirations."[164] However, the presumption of the inherently ethical nature of technology as progress, and therefore the ethical justification of the appropriation itself, persists. As a general principle, if fully free and prior informed consent of the communities at stake is possible[165] then collaborative research efforts and accompanying agreements may facilitate the research and development interests of industrialised nations, as well as protect the traditional rights in the resources, and the cultural and biological diversity therein. Indeed, the industry of biotechnology is itself described by some writers as a collaborative mechanism for the promotion of diversity and thereby stability through the preservation of biological resources:

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[161] See in particular Drahos (2000).

[162] An Australian example is Amrad, a Victorian pharmaceutical company that entered into a bioprospecting agreement with the Tiwi Land Council. The agreement allows Amrad to conduct research with plant species in the Tiwi Islands, with the assistance of local Indigenous groups. As Indigenous intellectual property lawyer, Terri Janke, argues, "This type of arrangement is likely to increase in the future as medical researchers seek to discover the full extent of earth's biological resources. Indigenous people should be aware of their intellectual and cultural property rights so that they can negotiate terms for sharing such knowledge, if appropriate" (1998): 11. See also the discussion in Christie J (1998): 61-62.

[163] Posey et al (1995): 896.

[164] Sutherland (1995b): 53.

[165] In other words, if all other factors are equal, overcoming potential imbalances in contracting power, then with free and prior informed consent, access to knowledge will no longer persist as a "taking." As the model developed in Chapter 9 will establish, a critical aspect of subsequent benefit-sharing agreements may indeed draw upon notions from open access models in order to facilitate ongoing development, access, and transfer of technologies developed upon traditional knowledge.

> Biotechnology can also help in recovering local empirical practices by acting as a bridge between scientific and empirical learning and by promoting diversity, genetic above all but even technical and social, as a mechanism of stability in farm ecosystems.[166]

Other commentators advocate bio-collecting agencies, "chartered in a way that attended to the broader purposes that are specified in the CBD and perhaps also the International Undertaking on Plant Genetic Resources," as a means of ensuring certainty in contractual relationships in research agreements, overcoming problems of transaction and enforcement costs, and stimulating a regular process of ordering between the respective interests.[167] It is suggested that a single global bio-collecting agency is more appropriate and more able to serve traditional and Indigenous communities than the national, localised agencies, by creating uniformity and clarity as to minimum standards, greater scrutiny of economic exploitation of Indigenous and traditional knowledge, and overcoming the need for an international treaty for national Indigenous and traditional intellectual property rights.[168] Drahos suggests that the international administration of such a system may facilitate greater transparency, uniformity, efficiency, and indeed scrutiny than a system distributed between various national collecting societies:

> It might also be argued that international organisations, for the most part, serve the interests of indigenous groups better than state organisations. States, not uncommonly, have been opponents of indigenous groups in the context of land claims and rights issues. Political-economic elites wielding the power of the state present the greatest danger to indigenous groups.[169]

Nevertheless, it remains prudent to be aware of the ongoing problems associated with access agreements in their current operation. Importantly, access agreements present

[166] Amoroso (1998): 172.

[167] Drahos (2000): 248. See also the discussion in Posey et al (1995).

[168] Drahos (2000): 248.

[169] Drahos (2000): 248.

the classic problem in contract law of unequal bargaining power, which the principle of a global bio-collecting agency seeks to overcome: "Clearly, a contract between an indigenous group and a multinational corporation is not a contract between equally well-resourced parties."[170] Contractual regulation of the relationship may not necessarily address the fundamental basis for protection, where that relationship is constructed upon a presumption of the ethical necessity of the taking. However, the capacity to contract is an important aspect of realising community autonomy, according to the concept of community resources, in recognition of customary management of natural resources. Building upon the principle of free and prior informed consent, such agreements may indeed fulfil a critical role in the acceptance and application of the model of community resources, and the transfer of technology to developing countries and indeed to the Indigenous and traditional communities themselves.

Ecology as Culture

> It has become imperative to recast the axes of values, the fundamental finalities of human relations and productive activity. An ecology of the virtual is thus just as pressing as ecologies of the visible world. And in this regard, poetry, music, the plastic arts, the cinema … Beyond the relations of actualised forces, virtual ecology will not simply attempt to preserve the endangered species of cultural life but equally to engender conditions for the creation and development of unprecedented formations of subjectivity that have never been seen and never felt. This is to say that generalised ecology – or ecosophy – will work as a science of ecosystems, as a bid for political regeneration, and as an ethical, aesthetic and analytic engagement. It will tend to create new systems of valorisation, a new taste for life, a new gentleness between the sexes, generations, ethnic groups, races …[171]

[170] Drahos (2000): 247.

[171] Guattari (1995a): 91-92.

The discussion thus far has shown that the CBD (and indeed international environmental models) present not only important acknowledgment of Indigenous communities but also serious limitations.

First, the CBD maintains a traditional model of contractual relations between national governments, without formally admitting traditional and Indigenous groups into negotiations. This is problematic in that there is no recognition of community, political or otherwise, other than as an aspect of this relationship between national sovereignties. It has been suggested that this relationship should be between three parties, with actual capacity and authority vested in community, rather than its effect as an aspect of negotiations.[172]

Second, the formalisation of recognition identifies and presumes a relationship with resources and land that is individualistic and materialistic, by realising that relationship primarily through systems of remuneration and benefit sharing. While these systems advocate access as well, possibly of greater concern is the means by which communities can be identified in order to figure in this contractual consideration. Fundamentally, the principle of benefit sharing presumes a character of place and territorial sovereignty over natural resources conferred upon national sovereignties, to which Indigenous and traditional communities are made subject:

> Current proposals that offer Indigenous peoples benefit sharing arrangements simply coerce Indigenous peoples into participation in the economic exploitation of their knowledge and resources without realizing the legal implications in doing so. No nation should be forced to market their cultural patrimony, yet that is precisely what current discussions suggest with regard to Indigenous peoples.
>
> Access and benefit sharing arrangements have become the paramount agenda in international fora. In particular, the current efforts to elaborate an "international regime on access and benefit sharing" taking place in the CBD's

[172] Ahren (2004).

> Ad Hoc Working Group on Access and Benefit Sharing will facilitate the exploitation of traditional knowledge and genetic resources, all in the name of sustainable development.[173]

Thus, efforts to identify Indigenous or traditional groups with whom to share benefits are always already defeated, in that the relationship of benefit sharing is promised between governments, but is merely aspirational on the part of communities.[174]

These limitations with the CBD reflect the kinds of discursive effects seen in other attempts to regulate community relationships to resources, namely intellectual property law and the protection of traditional knowledge. As earlier discussions suggested, part of the effect of regulation is to assimilate knowledge and to transform it into replicable, commodifiable, and exchangeable information. A similar problem can perhaps be identified in the CBD. Some critics of this document have argued that the CBD constructs the subject matter of protection in purely biological terms, without the input of human groups, other than as subsequent custodians of inevitable resources. The CBD compartmentalises biodiversity and the knowledge of nature as objects of information separate from the human subjects, in ways similar to that seen in other "global" narratives.[175] See, for example, in the Preamble:

> Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its *components*, ...Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its *components*.[176]

[173] IPCB (2004b).

[174] Ahren (2004).

[175] Introduced in Chapter 2 in the context of intellectual property law and considered further in Chapters 3 and 4. See the discussion of this aspect in Posey (2001): 3-23.

[176] CBD, Preamble. See also the discussion in Posey (2001): 3-21. See also Suzuki (1997).

This is contrary to the immutable relationship between community and resources that has been suggested throughout this work as fundamental to Indigenous and many traditional communities.[177] This has also been identified as distinct from protection imagined elsewhere, which accounts for diversity through community input:

> Where the FAO version articulates diversity as a heterogeneous achievement in which human being and doing is enmeshed through long and situated association in the spatial and corporeal fabric of botanical becomings, the CBD account casts it in wholly biological terms, the outcome of an evolutionary process divested of human presence. The one conjures a world that is hybrid 'all the way down,' enfolding humanity in its ceaseless commotion time out of mind. The other conjures a world until recently unmarked by the (invariably negative) 'impacts' of human society, only countenancing hybridity as a technological accomplishment associated with the advent of 'genetic resources … [T]hey bear witness to the political charge of hybridity in the fraught assemblage of 'nature's diversity' as the latest in a catalogue of phenomena to be (re)configured as a terrain of global environmental governance.'[178]

The CBD separates knowledge from community, contrary to Indigenous and traditional beliefs in the integral relationship between knowledge/resources and community, and in doing so, generalises communities as subject to the global natural resource of biodiversity. Nevertheless, each betrays a particular expectation of community to "effectuate" itself through (particular criteria of) work, as justification and evidence:

> [C]ommunity cannot arise from the domain of *work*. One does not produce it, one experiences or one is constituted by it as the experience of finitude. Community understood as a work or through its works would presuppose that the common being, as such, be objectifiable and producible (in sites, persons, buildings, discourses, institutions, symbols: in short, in subjects). Products

[177] This invisibility of cultural knowledge that does not conform to the recognisable forms devised by perspectives from the dominant, developed, and "civilised" world, is depicted by "The Iceberg Analogy" developed by the Lower Kuskokwim School District. The Iceberg hierarchises culture, with high culture at the peak, followed by folk culture (that is artifacts that are visible and "successful" through tourism and collection), and deep culture (which includes traditional ecological knowledge and which is submerged from view). Alaska Native Knowledge Network. http://www.ankn.uaf.edu/iceberg.html

[178] Whatmore (2002): 92. Whatmore is referring principally to the Food and Agricultural Organization (FAO Report, *Harvesting Nature's Diversity* (1993).

> derived from operations of this kind, however grandiose they might seek to be and sometimes manage to be, have no more communitarian existence than the plaster busts of Marianne.[179]

The necessary display demanded in order to register within institutional systems (such as intellectual property law, or international environmental law) undermines the integrity of Indigenous and traditional communities through the emphasis upon community as a complete and separate industrious subject. Apparent in these international frameworks is the way in which evidence for community is sought through rational input and "work":

> We rationalists perceive the reality of being members of a community in the reality of works undertaken and realized; we perceive the community itself as a work. The rationality of our discourse lies in the reasons adduced and produced; we perceive reason as a work – an enterprise and an achievement. The rational discourse we produce materializes in collective enterprises. To build community would mean to collaborate in industry which organizes the division of labor and to participate in the market.[180]

Thus, community is corporatised and individualised, reterritorialised as a rational, ambitious, competitive self. The true work of the Indigenous and traditional community is unpresentable in this system, is unrecognisable, and goes unacknowledged. For the institutional models of the environment, its components comprise a global resource; for communal models, nature and communal identity is inextricable:

> Well, we have the power there, the images in the rock and the paintings in the cave. And these are sacred places that give our energy, it comes from there. It's very important. Because of destroying that, we feel sad, because digging holes and blowing up all our powerful places, because there is a symbol like a woman's body image lying down, and a child's image there, and a man's image, and that's why it's very precious. That thing is going to be blown out

[179] Jean-Luc Nancy provides a thorough critique of this approach to community as a remnant of "modernity": Nancy (1991b).

[180] Lingis (1994): 5.

> and we can't give any evidence or story, because it's not there. And that's what we get pain from, that sort of thing that happened.[181]

This is the "invention" of community according to the dominant discourses of international "scientific" and legal regulation.[182] Unable to recognise natural models of community, therefore, the international model of biodiversity located in the CBD is similarly unable to conceive of community "territory." The community itself is rendered a resource of nations, a tool in the management of biological resources, rather than a presenter. The rendering of community as a resource must be resisted if the potential for cultural diversity through obligations to biological diversity might be realised. This admonition of territory through the deterritorialisation of community and its reterritorialisation as subject to national sovereignties (becoming subject) continues to be examined in the following chapter, where rights to land are considered as rights to culture and "territory." It will be seen that the "unmarked" world of global resources is always already marked by community.

Despite the promise that appears to be provided by international cooperation for the protection of traditional knowledge, the emphasis on multilateral cooperation in the context of intellectual property rights protects knowledge that is of economic value when disseminated in the marketplace. Such cooperation is based upon the sovereignty of the nation-state which contracts within the efficiency and "democracy" of the marketplace. Where the protection of traditional knowledge depends, however, on an international framework rather than the conventional pact inter-nations, as it

[181] Mowaljarlai (1995). David Mowaljarlai is a senior traditional lawman of the Ngarinyin people, in the West Kimberley, Australia.

[182] Augé discusses this anthropological invention of the Indigenous space as a "second nature": Augé (1995): 43.

were, it is possible to consider the order of that protection beyond the whims of the marketplace. Such an order must be provided through the international juridical production of the rights of community on a global scale, beyond the contractual framework of national sovereignties within the context of the market.

> If indigenous peoples are forced to relinquish their traditional customs and languages through, for example, assimilatory programmes which emphasise the conversion of their traditional economies based on biodiverse agricultural and hunter-gatherer ecosystems to cash economies based on monocultural systems of resource exploitation, then both cultural and biological diversity will suffer.[183]

Biodiversity-rich local communities are thus sources of tremendous commercial potential for private interests and economic potential for national governments, but neither the effective preservation of community custom that is associated with those resources, nor the sharing of these benefits directly with the Indigenous and traditional communities responsible for the knowledge exploited, has been adequately realised. While the CBD articulates a system of conservation of biological diversity as a universal cultural heritage, through an explicit acknowledgment of customary and Indigenous knowledge and technologies,[184] its importance as a resource for rights in traditional knowledge beyond the individual private rights established by intellectual property laws is subject to debate.

Utilising the aspirational principles of the Convention, however, there is an important opportunity for culturally relevant legal recognition of Indigenous and traditional communities and the customary management of resources as a resource in and of itself. Such management would be rendered effective in bio-prospecting agreements through requirements such as the prior informed consent of communities. In

[183] Fourmile (1999): 240.

[184] Davis (1999): 14.

respecting cultural diversity, there is a significant transformation in the means of protecting biodiversity and an important outcome in the end.

These principles of global resources, yet community management, might be translated in respect of all traditional knowledge. The importance of competing interests and other potential sources must also be addressed, towards achieving a truly multi-dimensional and holistic approach to protection, and the possible realisation of traditional knowledge through legal discourse. The following chapters consider the implication of rights to land, and the relevance of international human rights frameworks, to customary practices of communities.

Chapter 7: All Over the Place – Land and the Yarding of Culture

> You see, the land is not only to cultivate. The land is also for you to be cultivated in as a person. This is why, when the land is in the hands of others, you are only a tool.
>
> T Marcelino, Guarani Farmer, Bolivia.[1]

> For Aboriginal people, land is not only our mother - the source of our identity and our spirituality - it is also the context for our human order and inquiry.
>
> FAIRA[2]

> Well, I talk about the land. We all have symbols for land. And I don't own the land, but the land owns me. That is the strong thing in Aborigine law and culture. It's about the land. I'm only a servant, we all Aborigines are servants, we serve nature. That's why it's so important for us, because the land owns us.
>
> David Mowaljarlai, senior traditional lawman of the Ngarinyin people[3]

Introduction

The tension between "Indigenousness," cultural and physical belonging to nature and the land, and the economic and legal regulation of place is explored in this chapter. This is achieved through an examination of land rights and the concept of "territory,"[4] and then its application to a re-consideration of customary rights to land as they are read in Australian native title law.[5] The case of Australian native title is used because

[1] Quoted in UNICEF (2003): 2.

[2] The Foundation for Aboriginal and Islander Research Action. Issues: Aboriginal People and the Land. www.faira.org.au/issues.html

[3] Mowaljarlai (1995).

[4] Which is subsequently examined in the context of international human rights in Chapter 8.

[5] This chapter is by no means an exhaustive examination of native title law in Australia, a task well beyond its scope. More appropriately, it is an examination of the implication of "community," as considered in the analysis throughout this work, in the important application of rights to land and the potential relevance to the model of community resources, primarily in the Australian context. For an excellent review of the application of customary law to land tenure reform in sub-Saharan Africa (particularly in the context of women's rights to land), see Whitehead & Tsikata (2003).

of its recent and rapidly developing jurisprudence as well as its important exemplification of the competition for place in a developed country. As the claiming of rights by Indigenous groups within a developed country and ostensibly liberal-democratic society, the "minority" claims to land are significant,[6] and the conflict over place is seemingly exacerbated. Furthermore, as a modern democracy, Australia is a significant example of the ongoing conflict between minority rights to self-determination within a liberal democratic society,[7] implicit policies of assimilation, and a particularly acute sense of territory on the part of Australian Indigenous peoples. Importantly, this is expressed alongside critical political activity, particularly on the part of urban groups "connected" to place through cultural practice as distinct from physical attachment. This is crucial to the development of the concept of territory in this chapter, which seeks to undo the historicising rhetoric of the colonised Indigene, and the mystical connection to land, which is both damaging to rural groups and alienating for urbanised groups who maintain "territory" through cultural knowledge and practice.[8] This rhetoric of the "noble" Indigene has been criticised for its "spiritualising" of Indigenous Australians and creating damaging stereotypes:

> Reports … implied that non-material relationships with the land were specific to Aboriginal culture. Non-Aboriginal Australians could only stumble helplessly behind in ignorance, or push dismissively past in bulldozers. There were dangers in this stereotype for both sides of the debate. Aboriginal culture could only be made sacred through the bush, and non-Aboriginal culture was condemned to permanent alienation, being denied a spiritual connection to land.[9]

[6] This relationship between Indigenous claims and developed country introduces the conflict over human rights that will be explored in the following chapter.

[7] Considered in Chapter 8.

[8] See later, the example of the work of Cuban artist, Ana Mendieta, and the ongoing sense of Indigenousness.

[9] McKenna (2002): 142.

This chapter will establish that territory is not a simple equation between community and physical land or "place," but is a vital expression of community "space" that is ongoing because of community, not despite it (as suggested by Australian native title law's adherence to a physical connection to and grouping within physical place, discussed later in this chapter). Pursuing the disjuncture between knowledge (as understanding) and information (as commodity of exchange), this chapter traces the way land rights generally, and Australian native title law in particular, rationalise claims as competition for crowdable, rivalrous, physical place, and justify denial of rights through the event of the loss of that physical place. By defining community as a "neighbourhood" or place, community is thereby also "expired" or denied where that connection to place is severed.

Fundamentally, this chapter will show that this discursive action of the law upon community resources (in land) defines the "apparatus" of community through place, thus undermining the community in land and the knowledge in that land in its institutional blindness to the cultural resources embedded therein: "this elucidation of the apparatus by itself has the disadvantage of *not seeing* practices which are heterogeneous to it and which it represses or thinks it represses."[10]

The Competition for Place

> Houses in town for the Aborigines are out of the question, there are no empty ones to be had.
>
> Shire Clerk, Bega, 1965.[11]

While place (as physical situation), especially the competition for land as pre-conceived by western law, "excludes the possibility of two things being in the same

[10] De Certeau (1988): 41.

[11] Witton (1965). Quoted in McKenna (2002): 173.

location," community opens up space (as cultural and subjective capacity and belonging), as it were, that is mobile and dynamic, "in a sense actuated by the ensemble of movements deployed within it."[12] Community, therefore, territorialises place, and not the contrary: "In short, *space is a practiced place*."[13] This is the "territory" of community resources:

> [T]he opposition between "place" and "space" will rather refer to two sorts of determinations in stories: the first, a determination through objects that are ultimately reducible to the *being-there* of something dead, the law of a "place" (from the pebble to the cadaver, an inert body always seems, in the West, to found a place and give it the appearance of a tomb); the second, a determination through *operations* which, when they are attributed to a stone, tree, or human being, specify "spaces" by the actions of historical *subjects* (a movement always seems to condition the production of a space and to associate it with a history).[14]

Space, the territory of community, is created by community and its movements, rather than reduced by the law. Indeed, it is precisely through the movements of community that territory is also re-affirmed, rather than lost. In other words, "stories" (knowledge) are integral to the community, part of the community, and inalienable as commodities or individual expressions, deriving their legitimacy from the stability of tradition and the responsibility to its narration.

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[12] De Certeau (1988): 117. Also of interest here is the work of Henri Lefebvre work on space as a social production, concepts of "field of action" and "basis of action" related somewhat to space and place respectively, as considered in this chapter: Lefebvre (1991). Examining Indigenous Australians and landscape, Nancy D Munn identifies a similar concern, drawing upon the work of Henri Lefebvre, and considers the cultural production of a "mobile spatial field": Munn (1996): 446-65. This paper is reproduced in Low & Lawrence-Zúñiga (2003).

[13] De Certeau (1988): 117. See also the work of John Gray on community as producing and as a product of place, through the sharing of culture, using the specific case of sheep herding in the Scottish borders and the perception of a shared "way of life": Gray J (2002).

[14] De Certeau (1988): 118.

Community potential

> The landscape includes ground, trees, rocks and streams - the landscape as well as the people on the land who identify with the land, and its spirits.[15]

The discussion in Chapter 1 maintained that a community model for the protection and management of traditional knowledge will be ineffectual if indeed that model continues the historical archiving of community, the nostalgia of "tradition," and the moralising of the protection and safeguarding of the traditional community as a global "public good."[16]

Also introduced in earlier discussions, and traced throughout this work, is the problematic notion of community as a localised geographical creation, confined by house, neighbourhoods, settlements, families, and so on – that is, place in the conventional sense. However, the potential of modern communication, and the phenomenal evolution of community through that communication, have suggested an emergence of the concept of community beyond limits of place and materiality,[17] whether speaking of traditional communities or the virtual community. The concern is the processes through which the information exchanged in that communication is made readable and commodified, without necessarily acquiring understanding or, indeed, knowledge. Thus, the relationship between information and its exchange signifies a critical aspect of community in the context of the current debates. The preceding discussions of the application of intellectual property models to traditional knowledge, have suggested that the critical turn is communication as knowledge, as

[15] *Colin Goodsell v Galarrwuy Yunupingu*, Court of Summary Jurisdiction, Northern Territory of Australia (Gillies SM), 20 February 1998, (1999) 4 Australian Indigenous Law Reporter at 30.

[16] See for instance, the discussion of problematic nostalgic notions of community in Bauman (2000): 92.

[17] Bauman & May (2001): 111-112.

distinct from the use of information, the value of which is created by its commodifying exchange.[18]

Much of this conflict between private rights in information and communal rights in traditional knowledge may be traced to this territorial exchange value of information. Indeed, rights to land (and the possible cultural knowledge therein) and, as the next chapter will discuss, the right to self-determination, are more or less de-limited by place as a means by which to prevent the perceived proliferation of adversarial and competitive use. Thus the attachment to place continues the process of simplification and objectification of community knowledge, in ways not unlike the simplification of creativity and the legitimation of information through intellectual property requirements of origination (authorship, inventorship, the personality of information) and in-imitativeness (originality, inventiveness, novelty).

As discussed earlier, in the emphasis on finite place as distinct from community space, both for the definition of "Indigenous" and for the recognition of community,[19] traditional knowledge is disassembled, as it were, into information within an econo-legal framework of protection and regulation.[20] This discursive rendering of community as a finite place (and therefore translating space as recordable and "readable") diminishes knowledge to make it available as objects of information, operating as:

[18] See the earlier discussion in Chapter 2 regarding the corporatisation of information through intellectual property models, and the increasing emphasis on "ownership" in the resources necessary to assert intellectual property rights.

[19] Seen, for example, in the unbroken connection to place required by Australian courts in determining native title claims, discussed later in this chapter.

[20] Similarly, this compartmentalisation renders the issues of knowledge translatable as a contest. This is related to earlier discussions of intellectual property regimes and the economic modelling of information. See also McKenna (2002): 47, where he discusses the way in which Australian Indigenous land rights are constructed as a competition for place, rather than more appropriately understood as territory. This construction of land rights results in the kind of abrogation of rights to knowledge seen in recent native title decisions in Australia, and discussed later in this chapter.

> a mastery of places through sight. The division of space makes possible a *panoptic practice* proceeding from a place whence the eye can transform foreign objects into objects that can be observed and measured, and thus control and "include" them within its scope of vision ... It would be legitimate to define the *power of knowledge*[21] by this ability to transform the uncertainties of history into readable spaces.[22]

It may be seen that in exhausting knowledge in this way, and re-presenting it as information, the community is deterritorialised and deferred from its knowledge, culture, territory, and integrity. Knowledge, as has been maintained throughout this work, is an intimate part of Indigenous and traditional territory. In this way, territory is affirmed not through historical, legal, or classical anthropological renditions of place, but through ongoing community expression of space. For instance, the work of contemporary Cuban artist, Ana Mendieta, confirmed territory not through place but through the cultural materiality located in her work. Her example is particularly significant, as an urbanised, expatriated Cuban, for whom the re-inscription of the body in nature is critical:

> I have been carrying on a dialogue ... between the landscape and the female body (based on my own silhouette). I believe this has been a direct result of my having been torn from my homeland during my adolescence. I am overwhelmed by the feeling of having been cast from the womb (nature). My art is the way I re-establish the bonds that tie me to the universe.[23]

The project for community resources is not to define or objectify knowledge, but to recognise community in and of the resources, and the process of knowledge

[21] Institutional as distinct from the understanding conveyed in the way "knowledge" is used in this work.

[22] De Certeau (1988): 36. McKenna also notes this discursive containment of history through the law in *Looking for Blackfellas' Point: An Australian History of Place*, Sydney, UNSW P, 2002.

[23] Rogoff (2000): 124. Rogoff comments (at 130):

> The works themselves too are without boundaries within their sites since there is no exact place in which they either begin or end; thus they cannot be framed or bound within conventional artistic or geographical territorialities. Their extreme materiality – sensuous, brutal, culturally and physically suggestive – plays the role of foregrounding quality, texture and substance as opposed to definition.

Furthermore, as a performance artist, Mendieta and the very means chosen for her expression, resists attempts to fix and singularise such expression as a discrete work. See Cotter (2004).

embedded in that relationship. As the discussions have shown, as distinct from the fixation of community according to geo-historical place, the ongoing expression of tradition is vital to the dynamic concept of community, but inextricable from this connection to and expression through territory and its resources (cultural, natural, intellectual, and otherwise). Territory is not just the physical parameters of rivalrous place, but emerges through community practice and cultural knowledge. This integral relationship between knowledge, the earth and nature, and identity can be traced throughout Indigenous and traditional beliefs and uses:

> As LA Whitt explains, the Cherokee see knowledge itself as being an integral part of the earth. Thus, a dam does not just flood the land, but destroys the medicines and the knowledges of the medicines associated with the land. "If we are to make our offerings at a new place, the spiritual beings would not know us. We would not know the mountains or the significance of them. We would not know the land and the land would not know us. We would not know the sacred places. If we were to go on top of an unfamiliar mountain we would not know the life forms that dwell there."
>
> The same is true for the Mazatecs of Southern Mexico, whose shamans and *Curandeiros* confer with the plant spirits in order to heal: successful curers must above all else listen to the plants talk.[24]

Becoming Community – Marking Territory

> Over thousands of years Indigenous people have lived in Australia developing a unique system for signposting and marking the land. This system is interconnected with stories of the Dreaming and Spirit Ancestors. Indigenous people use natural features of the landscape to identify and mark the land and its significance. Many Indigenous children learn these "mental maps" of their countries and about how places relate to each other and to people.[25]
>
> I really get cross when people say, "Oh, what are you on about? You don't come from here anyway!" That really sticks in my craw. I always say, "Look, that's not important. I'm Koori, that's it!"
>
> Mary Duroux, Moruya[26]

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[24] Posey (2001): 4-5.

[25] Dreaming Online: The Land. http://www.dreamtime.net.au/indigenous/land.cfm#bi

[26] Quoted in Chittick & Fox (1997): 163.

While belonging to incorporeal, infinite, and timeless territory as a province of knowledge, community nevertheless refers to finite place that may be identified by ancestry, heritage, and practice.[27] Furthermore, place may be neither sufficient[28] nor even necessary,[29] but will frequently be relevant as an aspect of the resources of community. The concept of community resources, therefore, does not deny the importance of actual identifiable place, but eschews the pre-conception of simplistic identification of origin and the ontological separation of community and its resources:

> Subject and object give a poor approximation of thought. Thinking is neither a line drawn between subject and object nor a revolving of one around the other. Rather, thinking takes place in the *relationship* of territory and the earth … Yet we have seen that the earth constantly carries out a movement of deterritorialization on the spot, by which it goes beyond any territory: it is deterritorializing and deterritorialized. It merges with the movement of those who leave their territory en masse … the earth is not one element among others but rather brings together all the elements within a single embrace while using one or another of them to deterritorialize territory. Movements of deterritorialization are inseparable from territories that open onto an elsewhere; and the process of reterritorialization is inseparable from the earth, which restores territories.[30]

The "community" is not tied to neighbourhood, to place, but is deterritorialised, and the model of community resources comes from a reterritorialisation of community itself, not from external (and revocable) regulation imposed upon the perception, conceptualisation, and management of traditional knowledge. In other words,

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[27] This is derived from Guattari's distinction between the virtual Universes of value, and finite existential Territories, but departs from this distinction in maintaining territory as central to community without limiting it to physical space. A re-definition of "territory" pre-figures the incorporation of knowledge into information systems that seek to limit the knowledge in "territory" according to the same taxonomy. See Guattari's discussion in Guattari (1995a). This shares aspects of Deleuze's notions of the relative (finite Territory) and absolute (virtual Universe of value): Deleuze (1986).

[28] This is important to arguments against the denial of community based upon the loss of place (as in Australian native title law).

[29] For instance, place may not be critical in the same way to the lifestyles and cultural expression of some traditional communities, including the Roma.

[30] Deleuze & Guattari (1994): 85-86. It is worth considering here also the slightly different principles put forth by Merleau-Ponty, who understands a kind of symbiotic and mutually constitutive relationship between the animal (nature) and the person, rather than essentialism based upon evolutionary hierarchy. See the discussion in Merleau-Ponty (1988): 165.

community cannot be separated out by the physical information and boundary-making of place, but is expressed through the ongoing character of land and resources within community, as territory.

Territory emerges, therefore, in the interaction between community and resources, in the refrains of knowledge, as it were. Land is therefore a resource of the community that is recognised through the tradition and cultural knowledge inhering in the land, rather than competitive relationships to land: "it is land involved in a particular relationship which is perceived as a resource, and thus the land itself *refers to* the site of real valuation – generative or productive relations between persons."[31] The site of contestation, of territory, is that of culture and community. "Land" is always already marked by community, the marking and making of territory, but physical land in and of itself is indexical of the depth of community integrity indicated by that land.

Therefore, while communities may be dispersed and alienated from their physical land (place), the assertion as communities cannot be defeated by this displacement, because of this disembodied memory of the community subjectivity (space).[32] This relationship anatomises territory. In other words, territory cannot be realised and accessed without the facilitation of community management and governance. Territory cannot be understood simply in terms of place, rendered the physical "information" exchanged between community and the separate legal regulation of its resources. Territory does not pre-exist community, but can emerge only in the becoming of community, producing the site, the location, the "neighbourhood" of

[31] Leach (2004): 42.

[32] Guattari refers to the impossibility of being wiped out in the process of "historical discursivity," such as the discursive translation of traditional knowledge through intellectual property law and through its misappropriation into non-traditional copyright, inventions, and so on, because of the persistence of the irreversible refrain of "the incorporeal memory of collective subjectivity." Guattari (1995a): 27.

culture. The marking and recognition of territory, therefore, occurs not through imperial models of "title," but through community: "All the inhabitants have to do is *recognize* themselves in it when the occasion arises."[33] Thus, territory is not delimited by western conceptions of physical space, of utility, and of resources. These indications of territory are incomplete and worse, misleading in the attending subsidence and alienation of knowledge:

> Still, we do not yet have a *Territory*, which is not a milieu, not even an additional milieu, nor a rhythm or passage between milieus. The territory is in fact an act that affects milieus and rhythms, that "territorializes" them. The territory is the product of a territorialization of milieus and rhythms … There is a territory precisely when milieu components cease to be directional, becoming dimensional instead, when they cease to be functional to become expressive. There is a territory when the rhythm has expressiveness. What defines the territory is the emergence of matters of expression (qualities).[34]

What defines the territory is "community."

> The territory is not primary in relation to the qualitative mark; it is the mark that makes the territory.[35]

Thus, the relationship of community to territory and resources is realised not through the linkage of territory as object with an individual legal subject, but in its sense-making through customary law, which will differentiate territory (understood not just as land, but as knowledge, culture, and so on) according to subjects who are recognised by the community and perform within the community. In other words, rights will be conferred upon subjects because of their status within the community, and not despite it. Those individuals will not be "subjects," as such, unless recognised by the community. The agency of community does not constitute the individual subject, but the territory (knowledge, culture, land):

[33] Augé (1995): 44.

[34] Deleuze & Guattari (1987): 315.

[35] Deleuze & Guattari (1987): 315.

> The expressive is primary in relation to the possessive; expressive qualities, or matters of expression, are necessarily appropriative and constitute a having more profound than being. Not in the sense that these qualities belong to a subject, but in the sense that they delineate a territory that will belong to the subject that carries or produces them. These qualities are signatures, but the signature, the proper name, is not the constituted mark of a subject, but the constituting mark of a domain, an abode.[36]

The model of community resources accounts for the knowledge and identity in land, culture, expression, and nature. This is distinct from the assimilation of community territory within legislative responses to land claims as competitive claims. Such responses attempt to decode externally the relations between community and resources,[37] ultimately erasing territory and abode[38] in the process. The legitimate subject matter of this model, therefore, is that of "community resources," rather than aspects decoded and compartmentalised according to existing laws, whether they be intellectual property, environmental, or rights to land. Drawing upon recent manifestations in Australian native title law,[39] it is necessary to trace the conflict between the exclusory *this land is mine*, and the inclusory dialogue and communal sustenance of *this land is me*.

Community in Land: An Australian Personification

> This land is mine …
>
> *This land is me* …
>
> One Night the Moon, 2001, Director Rachel Perkins.[40]

[36] Deleuze & Guattari (1987): 316.

[37] A discursive reckoning identified in Chapters 2 and 3 in the context of intellectual property law, and Chapter 6 in the context of biodiversity.

[38] Used in the sense of Deleuze and Guattari, in the context of Territory and becoming community, in Deleuze & Guattari (1987).

[39] While the discussion will deal primarily with Australian native title for the reasons outlined in the introduction to this chapter, other examples will also be provided where relevant.

[40] One Night the Moon (2001).

These two lines come from the Australian musical film, One Night the Moon, directed and co-scripted by Australian Indigenous film-maker, Rachel Perkins. Based on events from 1932, it is the story of the disappearance of the daughter of a pastoralist couple who, after waking up at the bright moonlight streaming into her bedroom, wanders into the night chasing after the moon and is lost in the bush. The father refuses the help of an Aboriginal tracker and orders him off his land, an action with tragic consequences. In the scene from which these words come, the father's refrain, "This land is mine," is juxtaposed by Albert the Tracker's refrain, "This land is me."

This film is particularly striking in its capture of one of the key differences between the concept of ownership under property law (and indeed, intellectual property law) and Indigenous Australian custodianship with respect to land and the traditional and cultural knowledge found within that land. While conventional models of real property ownership vest in the individual, rights with respect to a recognisable and exhaustible entity, diverse Indigenous concepts of custodianship resist the homogenising universality of this regime, and suggest various relationships of shared and enduring interaction with the land that transcend each individual and indeed the "boundary" of the parcel itself. Real, yet intangible, non-exhaustible, and inalienable, the various forms of Indigenous and traditional custodianship cannot be translated as the finite and temporary *this land is mine*, in which the enduring community in *this land is me* will expire.

In addition to intellectual property laws, the various laws pertaining to native title claims over traditional lands have been suggested as a means of protection for cultural practices associated with the land.[41] In Australia, recognition of the necessary

[41] Puri (1993): 159.

relevance of customary law to the interpretation and application of intellectual property rights in Indigenous cultural property appeared to be extended by the High Court in the decision of *Mabo v State of Queensland (No 2)*,[42] which ultimately led to the enactment of the Native Title Act in 1993 (NTA). However, Australian native title law, in its judicial determination, requires a continuous connection to the land. This requirement is often fatal to claims in that dispersal of groups and alienation from cultural practice have almost inevitably occurred during the process of colonisation.[43] The material form that is central to the application of native title legislation, at least in Australia, is that of the community itself as a fixed and permanent entity in a geographical and historical place, thus defeating its evolution by fixing and locating tradition at that moment.

1. Real Intellectual

While the consequences of this application of community in Australian native title law are considered below, the character of this relationship between community and resources, in the context of the concept of territory developed thus far, allows the identification of the injustice of the separation of cultural knowledge and natural resources in the application of this law. Indigenous and traditional resources (including genetic resources, traditional knowledge in agricultural, medicinal, and other knowledge and methods, and folklore in art works, performance, stories, and so on) are almost inextricably linked to the land. This is not to suggest that such processes are impossible without access to this physical land, but to reiterate the significance of a more holistic conception of "resources" and knowledge as beyond

[42] (1992) 175 CLR 1

[43] This is also relevant to concerns over self-determination in international human rights law, considered in Chapter 8.

that of products registered by intellectual property law and to include knowledge in and of the land itself. Thus, access to land is also relevant in the context of freedom of expression, and access to the means to fulfil that expression. Despite this relationship between land and culture, Australian native title law has resisted the acknowledgment of rights to cultural knowledge inhering in land, separating this as within the ambit of intellectual property laws. Therefore the law, in its application, justifies (alarmingly) the extinguishment of rights through alienation from the land and perceived "loss" of traditional knowledge.[44] Furthermore, the international community also neglects the link between cultural knowledge and land, despite the conflict over access being conflict over resources in that land, and international discussions toward protection have placed the responsibility for examining protective regimes within an intellectual property context, in the form of the WIPO IGC.[45] Nevertheless, the problems with this separation are identified by the IGC itself:

> The working concept of TK … puts a particular emphasis on the fact that TK is "tradition-based." That does not mean, however, that TK is old or that it necessarily lacks a technical character. TK is "traditional" because it is created in a manner that reflects the traditions of the communities. "Traditional", therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated … TK is a means of cultural identification of its holders, so that its preservation and integrity are linked to concerns about the preservation of distinct cultures *per se*.[46]

Indeed, the adequacy of native title laws is defeated by the same misunderstanding that underpins attempts to assimilate traditional knowledge within intellectual

[44] John Scott, Secretariat for the Permanent Forum on Indigenous Issues at the Division for Social Policy and Development, DESA, made the following comment on the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002): "The Yorta Yorta, unfortunately, listened to their lawyers, and the judge found that they had no claim to their native title because they were locked away on mission a hundred years ago and lost most of their traditional language and traditional knowledge." See Scott (2004): 9.

[45] See Chapter 2 and the discussion of the work of the WIPO IGC in Chapter 4.

[46] WIPO/GRTKF/IC/4/8 (30 September 2002): 11

property models. Once again, the underlying objectification of information facilitates the translation of the cultural values of identity and community cohesion (*This land is me*) within the paradigm of individual ownership (*This land is mine*).

2. Becoming community: *this land is me*

> Land is our life, land is our physical life - food and sustenance. Land is our social life, it is marriage; it is status; it is security; it is politics; in fact, it is our only world. When you take our land, you cut out the very heart of our existence.[47]

In order to achieve an effective legal subjectivity for the Indigenous or traditional community, the community must be able to evolve beyond the fixation of the geo-historical moment of colonisation.[48] This perspective enables the enduring identity and autonomy of a particular Indigenous or traditional community despite its evolution and adaptation in the face of ongoing colonisation and the effects of dispersal and alienation: "community should not be thought of solely as the domain of the small scale and geographically local."[49] This capacity for development must be an aspect of real authority and autonomy within an international legal model of community resources. While land and territory are integral to culture and indeed to identity, this "connection" persists despite physical separation and colonisation:

> The significance of land is not restricted to indigenous peoples who continue to inhabit their place of origin. For those who have been forced off their land or who have moved, often to urban areas or shanty towns, for economic reasons, to escape armed conflict or to pursue education, the spiritual homeland continues to possess deep cultural resonance that is often reconfirmed by periodic ceremonies or rituals. From this perspective, denying indigenous children access to sacred sites because, for instance, they have been privatized or militarized, means denying them an important aspect of their own identity and compromising their full development.[50]

[47] Residents of Bougainville, southwest Pacific, quoted in Miriori (1996).

[48] See the discussion in Chapter 1.

[49] Little (2002): 63.

[50] UNICEF (2003): 2.

In other words, land may be denied, but communities can never be alienated from territory. Indeed, it is the persistence of territory that makes ongoing denial of access to land meaningful and significant to Indigenous communities. As distinct from individual relationships to a commodified entity (*this land is mine*), the community is realised through the ongoing and enduring relationships between members despite changes to its particular constitution over time. The identity of community, as it were, persists in the integrity of cultural and traditional expression and use of resources – *this land is me*:

> [M]y work is very closely associated with an affinity for the land. This affinity is at the essence of my religious beliefs. The unauthorised reproduction of artworks is a very sensitive issue in all Aboriginal communities. The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.[51]

In order to realise access to the public sphere, and to enjoy authority to act within that sphere, the community cannot be known, captured, translated, and incarcerated in a geo-historical locus, but must be self-determined and self-recognised. The problem persists, however, that "[t]he traditional sociological approach implies that when community is stripped of the local spatial dimension, it becomes such an elusive idea that it becomes virtually meaningless."[52] That meaning comes not from the narration by, and summarising effects of, the legal system, and not from sociological models. That meaning must come from affording the community the space in which to assert and narrate itself.[53]

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[51] Indigenous artist, Bulun Bulun, quoted in Golvan (1989): 348.

[52] Little (2002): 57.

[53] This becomes particularly relevant when considering the Australian Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), or ATSIC Act, which goes some way towards providing the legal

Indeed, the evolution of a community is vital to its ongoing integrity and identity, rather than destructive to identity in a contemporary context. That is, the evolution of community should not prevent the protection imagined within a *sui generis* system of obligations to the practice of community itself, as has effectively occurred in recent applications of the NTA; but rather, that evolution should be an intrinsic part of its traditional expression of self. The stability in tradition, to which Indigenous and traditional communities express responsibility, in fact confers the legitimacy upon that evolution in the traditional narration of identity.

3. Determining Community: *this land is mine*

As introduced earlier, the NTA was enacted to administer the *sui generis* rights in land that were recognised by the High Court of Australia in *Mabo v State of Queensland (No 2)*.[54] This decision of 1992 appeared to recognise the necessary relevance of customary law and, by extension, Indigenous cultural property in the traditional use and cultural practices associated with that land, such as agricultural practices, fishing sites, or the knowledge and use of medicinal plants.[55] However, its conceptualisation of communal ownership defers to a classical historical fixation of the community as object, rather than realising community as a subject before the law. Furthermore, the evolution of native title in the Australian courts suggests an

and social space for this opportunity. Currently being reviewed for amendment, it is considered in more detail below.

[54] (1992) 175 CLR 1. This awareness of the relevance, and the subsequent application of customary law in evidence, was continued in the cases of *Milpurrurru v Indofurn Pty Ltd* (1995) AIPC ¶91-115 and *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 524.

[55] Puri (1993): 159.

attenuation of rights made possible through this geo-historical "form" of community.[56]

The critical decision of *Western Australia v Ward*,[57] handed down by the Australian High Court of Australia in August 2002, has eroded significantly the strength of native title rights and has defeated the potential for those rights to protect cultural knowledge in the land. Of particular importance in this decision is the strict requirement imposed by the Court, for the physical connection to land.[58] This betrays the reliance by the Court on the traditional sociological notion of community when applying the Act. The Court has progressively fixed the concept of community according to its historical constitution and location, that is, as a colonial commodity.

The application of the concept of community in this decision is of critical significance to a consideration of communal custodianship. It demonstrates the seriousness of limiting community to a traditional geo-historical and recognisable entity, as distinct from respecting the narrative process of cohesion and integrity between individuals through recognition and shared practices, and acknowledging the fracturing of community through this regulation of land and culture as separately defined entities.[59]

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[56] For a more expectant reading of the relationship between customary law and Australian property law, see Strang (2000): 93-115.

[57] (2002) 191 ALR 1

[58] The requirement for a "connection" with the land is provided in s 223(1) of the NTA. It is worth noting that, in the past, lower courts have been less rigorous in demanding continuity of physical presence on traditional territory (*Re Waanyi People's Native Title Application* (1995) 129 ALR 100 per French J at 114; *Mason v Tritton* (1994) 34 NSWLR 572 per Kirby P at 584). In the *Mabo (2)* decision, Toohey J required a continuing physical presence since colonisation.

[59] The obligation to create cultural objects and express culture is concurrent with the relationship to the land. Indigenous Australian artist, Mr Bulun Bulun, quoted in *Minding Culture* (2003), states: "If the rituals and ceremonies attached to land ownership are not fulfilled, that is if the responsibilities in respect of the Madayin are not maintained then traditional Aboriginal ownership rights lapse" (56). Terri Janke, author of the Report explains:

> Furthermore, Mr. Bulun Bulun stated that the unauthorized reproduction of the artwork threatened the whole system in ways that underpin the stability and continuance of the Yolngu

In *Ward*, the High Court ruled out the extension of the NTA to the protection of cultural knowledge except to the extent of controlling access to land and waters in which that cultural knowledge is situated. While cultural knowledge may inhere in the land, the decision ruled that any interests in that knowledge will be relevant only in terms of denial or control of access to land or waters. Anything beyond this physical control will not be interests or rights protected by the NTA:

> [I]t is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under para(c) of s 223(1). The "recognition" of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.[60]

The Court held that the Act refers not to how Indigenous peoples use or occupy land or waters, but to a physical "connection"[61] and whether that connection can be established on the basis of the applicable traditional laws and customs.[62]

Effectively, conventional notions of community[63] assimilate the concept within current models of "collective" ownership and rights. In other words, community persists as a geo-historical moment, a particular entity, an individual. The viability of community is defeated by this adherence to the primacy of the normative individual entity of rights-based frameworks. Earlier discussions considered this in the discourse

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> society. Unauthorized reproduction interferes with the relationship between the people, their creator ancestors and the land given to the people by Barnda. (56)

[60] Para 59.

[61] The quality of this unbroken connection must be understood in a more conventional Western sense, as distinct from any "connection" or relationship suggested through the cultural production of territory in the concept of community resources.

[62] Para 64. In consideration of section 223 of the Act.

[63] For instance, community is used to refer to any range of loose collectives, usually characterised by a feature "in common" which attracts individuals into a collective, but for whom that collective will not necessarily suggest the collective subjectivity upon which individual independence and social worth is understood in Indigenous and traditional philosophies of communalism. Posey (2001); Guattari (1995a); Guattari (1995b).

of intellectual property rights, but the following chapter raises some concerns with dominant conceptualisations of collective rights to self-determination. The effect of this assimilation is particularly serious in native title litigation. Community is constructed according to place, which may seem obvious given that the litigation involves *sui generis* rights to a particular place. What is not obvious is the connection requirement, where colonisation almost invariably breaks the traditional community's physical connection and in some cases ability to maintain the cultural connection to a place. Furthermore, traditional use by that community is constructed according to time, to the historical moment of colonisation. The result is a strict definition of a group constituting that community, rather than an understanding of the internal differentiation according to values and principles that characterise the particular community. Community becomes an object of history rather than an expression of the necessary subjectivity for which entitlements to certain rights will apply, and traditional use and cultural knowledge is objectified and archived as cultural artifact, rather than recognised as part of the ongoing expression of the viable community.

This position is evident in the Court's finding that there were no existing interests in minerals and petroleum that could have been disturbed by the event of colonisation. This was because traditional laws and customs did not extend to the modern mining of such resources at the moment of colonisation.[64] Thus, traditional use or knowledge will be fixed according to this particular historical moment, and the community is also

[64] Compare the judgment of the Constitutional Court of South Africa, in *Alexkor Ltd v Richtersveld Community and others*, (2003) CCT19/03. The Court held that the Richtersveld Community had been dispossessed of land rights as a result of racially discriminatory laws and practices. Significantly, however, the Richtersveld people, from the Nama subgroup of Khoikhoi peoples, had always lived in the area called Richtersveld and were evicted in the 1950s in order to install the diamond mine. The Court ordered, inter alia, that the community was entitled to "restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof)" (at 50-51). The decision has been interpreted as ruling that Indigenous people have both communal land ownership and mineral rights over their territory that may be persuasive in other jurisdictions.

installed as a particular historical entity in that anything it achieves or produces or expresses beyond that moment seemingly has no relevance to the traditional narration of community. The community has no potential; the Court has no "sense" of community.

In his minority judgment, Kirby J questioned this position, addressing the relationship of the modern community to the land, and identifying the artificial restriction imposed upon the community by its historicisation and indeed its construction as competing for physical, crowdable "place." Kirby J considered that it may be possible to protect cultural knowledge under the provisions of the Act, and queried the separation of native title rights to resources in petroleum and other minerals from other rights in the land (such as those arising through the historical use of ochre) based merely upon the view that they are minerals that are mined by modern methods. His Honour noted that the common law recognises the capacity of traditional law and customs to evolve and adapt (citing *Rubibi Community v State of Western Australia*[65]) and in doing so, suggested that the common law may incorporate the use of modern materials or resources that might have developed relevance to Indigenous communities:

> When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.[66]

[65] (2001) 112 FCR 409 per Merkel J.

[66] Para 574. Ultimately, however, Kirby J did not provide a finding in respect of minerals and petroleum due to the extinguishing effect of the Mining Act 1904 (WA) and Petroleum Act 1936 (WA): Jagger K, "*Ward*: Mining and Petroleum," (2002) 5(10) *Native Title News* 170.

The principle in *Ward* was subsequently applied by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria*[67] and the Federal Court of Australia decision in *De Rose v State of South Australia*,[68] handed down in early November of 2002. In *De Rose*, O'Loughlin J declined to protect the disclosure of spiritual beliefs and practices related to "places on the land" under the NTA, stating that the precedent in *Ward* has "made it clear that matters of spiritual beliefs and practices are not rights in relation to land and do not give the connection to the land that is required by s 223 of the NTA."[69] With due respect to O'Loughlin J, *Ward* does not necessarily decide that spiritual beliefs and practices have no connection to the land, but that the NTA does not extend to the use of those resources beyond controlling access to the land in which those cultural resources are situated or practised. The majority decision maintains that intellectual property laws or fiduciary duties may afford some protection to these rights. What the decision in *Ward* does state is that claims to protection of cultural knowledge are not rights protected by the Act. It is not in the joint decision, but in the single decision of Callinan J, that the rights to cultural knowledge are not considered to be in respect of land: "cultural knowledge does not constitute a native title right or interest 'in relation to land or waters'."[70]

Further, Kirby J notes the application of the distinction between the protection of cultural knowledge through the restriction of access to a physical area, that is, through the restriction of and competition for *place*, and that of protection through restricting access to representations, images, or oral accounts of knowledge relating to land or

[67] [2002] HCA 58 (12 December 2002)

[68] [2003] FCAFC 286 (16 December 2003).

[69] Para 51.

[70] Para 964.

waters (cultural and community *space*).[71] In his minority judgment, Kirby J maintains that if cultural knowledge is related to land then it must be protected for the purposes of the NTA, particularly in the context of Australia's ratification of international instruments providing for the protection of fundamental human rights,[72] including those rights to full ownership, control and protection of cultural and intellectual property.[73] Thus, communities are able to access co-existent intellectual property rights where relevant. This is not to deny the relevance of the concept of community resources, but paradoxically, to respect it. Indeed, in this obiter dictum, Kirby J begins to characterise, legally, an effective understanding of territory within the constraints of the law. Referring also the UN Draft Declaration on the Rights of Indigenous Peoples, Kirby's judgment recognises the community production of territory, as set out in Article 12:

> Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

While noting the majority decision that such rights are within the ambit of intellectual property laws, Kirby J suggests the inadequacy of this framework to protect cultural knowledge, particularly as understood within Article 12 of the Draft Declaration. Referring to the decision in *Yumbulul v Reserve Bank of Australia*,[74] Kirby J notes the majority decision that such rights are within the ambit of intellectual property laws,

[71] Para 579.

[72] Para 579.

[73] Para 581.

[74] (1991) 21 IPR 481

but states that established intellectual property regimes are "ill-equipped to provide full protection of the kind sought in this case." Furthermore, Kirby J rejects the assertion in *Bulun Bulun v R & T Textiles Pty Ltd*,[75] that recognising native title rights that are analogous to intellectual property rights would contravene the "inseparable nature of ownership in land and ownership in artistic works" under Australian common law. Von Doussa J, in *Bulun Bulun*,[76] maintained that to recognise cultural knowledge in land would fracture the Australian legal system in ways cautioned against in *Mabo (No 2)*:

> In Mabo [No.2], Brennan J said (at 43): "However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system". In order to be successful, the applicants' foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the Court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law. The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as "skeletal" and stand in the road of acceptance of the foreshadowed argument.[77]

Kirby J argues, however, that such a principle cannot be maintained where it offends justice and human rights. This potential for protection through reference to human rights frameworks is explored in the following chapter.

4. Recognising Community

> These things which make us Indians can be seen. But there is another thing which cannot be seen and which we should remember: we are Indians because we believe that the things of this world are made for everyone. It is like saying that since we are all equal, the means of living should also be equal.

[75] (1998) 41 IPR 513 at 524.

[76] (1998) 41 IPR 513 at 524.

[77] 41 IPR 513 at 524.

Consejo Regional Indigena del Cauca[78]

Recognition, as a cohering phenomenon of community, was introduced in earlier discussions, and its practical application can be identified in the Aboriginal and Torres Strait Islander Commission (ATSIC) Act, enacted in 1989.[79] Despite the way in which community is understood in the determination of rights to native title under the NTA, the Australian courts are not unfamiliar with its quality under the ATSIC Act. This interactive concept of community (rather than the geo-historical conceptualisation described earlier) can be discerned in judicial application of the ATSIC Act, and in particular, in the determination of "aboriginality" under the Act. Recalling the serious limitations of the NTA, the ATSIC Act presents an important recognition of community as extending beyond place and indeed towards a legitimate application of community through mutual recognition and self-identification, as understood in respect of community resources and territory. The difference appears to be that of a rendering of community as adversary and actor in a competition over place in native title laws, as distinct from a "witnessing" of the internal differentiation of community according to customary law in the ATSIC Act. The fact of this application of the principle of recognition is significant.

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[78] Extract from the First Bulletin (1973) of the Consejo Regional Indigena del Cauca (CRIC) the Indigenous Regional Council of Cauca. See CRIC (1973). Founded 24 February 1971, the CRIC is instrumental in land rights struggles in Colombia. See also http://www.nativeweb.org/papers/statements/identity/colombia.php

[79] At the time of writing, the Australian Federal Government had introduced controversial plans to dismantle ATSIC. For a background to the ATSIC changes and review, see the brief released by the Australian government, *Make or Break?* (2003). See also the Public Discussion Paper, released in June 2003, *Review of the Aboriginal and Torres Strait Islander Commission* (2003) and the subsequent Report released in November 2003, *In the Hands of the Regions: A New ATSIC* (2003). See also media on the controversy including the SBS News Reports, Canberra March Protests ATSIC Abolition (2004) and Senate Inquiry Sought Into ATSIC Abolition (2004). See also work of civil society organisations in relation to this plan, including ANTaR, Australians for Native Title and Reconciliation, at http://www.antar.org.au/atsic.html ("ATSIC: The End of Self-Determination?") and http://www.antar.org.au/atsic_lathamltr.html; and Friends of the Earth http://www.melbourne.foe.org.au/barmah/barmah_sdaction.htm. Nevertheless, these changes to ATSIC do not affect the relevance of the jurisprudence of this Act to the present discussion of community.

In applying this Act, the Federal Court of Australia has stated that communal recognition and integrity of the community is of paramount importance in deciding the question of Aboriginality. The Court has noted that while biological descent may be relevant, it is not sufficient to establish Aboriginality, and has stated that communal recognition as an Aboriginal person is the best evidence available to prove Aboriginal descent.[80] Thus, the ATSIC Act presents a dynamic and organic model of community that is built upon the subjectivity of the relations between individuals. This is quite distinct from the "objective" indices of community such as geographical location or genetic heritage. This shift is vital towards developing a legal subjectivity for community in international community resources:

> Aboriginality as such is not capable of any single or satisfactory definition. Clearly the Aboriginality of persons who have retained their spiritual and cultural association with their land and past will differ fundamentally from the Aboriginality of those whose ancestors lost that association.[81]

Importantly, Aboriginality cannot be legislated as such under the Act; that is, it cannot be subject to the imposition of formal memberships or regulated by institutional structures that would necessarily undermine the very concept of Aboriginality itself. In this same way, the concept of community resources involves the capacity for communities to be self-regulated and self-determined. Thus, the non-hierarchical and non-linear organic nature of community is facilitated by the framework created to protect not only traditional knowledge and folklore, but also the cultural diversity and autonomy of Indigenous and traditional communities through the particular

[80] *Gibbs v Capewell* (1995) 128 ALR 577 per Drummond J.

[81] *Shaw v Wolf* (1998) 83 FCR 113 per Merkel J.

community's entitlement to exercise customary practice and governance in respect of that material.[82]

A just realisation of community resources, and of the relationship (territory) between community and land, is defeated if "use" is to be pre-determined by the regulatory regime, and categorised according to simplified accounts of use-information, preventing the proliferation of territory, as it were, through the becoming of community. It is to constrain and contain community according to place (the process of origination), and to colonise territory as a prior informational limitation upon community, rather than a geo-physical trace.

Drawing upon the actualisation of territory through community, the relationship between rights to land and human rights to self-determination, for which the principle of territoriality is critical, must necessarily be explored. The sources for community resources found in human rights frameworks are the subject of the next chapter. Are community resources human rights?

[82] Note, however, the importance of balancing this protection with individual intellectual property that may be created, as discussed in chapter 2.

Chapter 8: Determining Knowledge – Human Rights and Community Resources

Introduction

It would be an impossibility and an injustice to attempt to address the complex international law of human rights, as relevant to minorities and Indigenous peoples, within the limits of a single chapter. However, as a preparation for the model put forward in the next chapter, it is vital to address international human rights law as a kind of aspirational framework to which earlier chapters have implicitly and explicitly referred, and as a foundational basis upon which to build the model of community resources set out in the following chapter. Towards the protection of the traditional resources and expressions of Indigenous peoples and traditional communities, a rights-based model has been advocated as the means by which to recognise cultural and social rights in those resources.[1] In this model, the duty to uphold those rights is necessarily international, and state responsibility for the protection of those rights extends not only to the citizens within its territories, but also to the systematic sanction (economic or otherwise) of organisations and states which violate those rights. However, concerns persist over the historical and political biases of human

[1] Coombe (1998b); Van Fleet (2003); Hill (2000). See also the call for greater interaction between intellectual property protection and human rights frameworks in Drahos (1999) and the impact of intellectual property protection upon individual human rights in Chapman (2002). On the relationship between trade and human rights, see Cottier (2002). In 1993, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples constructed intellectual property rights within notions of self-determination. The IPCB (2004b) has asked the UN Permanent Forum on Indigenous Issues, in the first in its list of recommendations, to "advise WIPO and the CBD that these forums are not the appropriate forums for the development of international regimes or instruments for the protection of genetic resources, traditional knowledge and folklore. The appropriate place for these discussions would be under the auspices of the Sub-Commission on Human Rights, such as the Working Group on Indigenous Populations." Note also the discussion of the relationship between cultural diversity and biodiversity in Chapter 6 (see Fourmile (1999): 239), and the inextricable link between cultural knowledge, biodiversity, and human rights seen throughout.

rights, and the foundation of human rights law in the context of changes in political structures towards the significance of the nation-state and liberal democracies.[2]

The major concerns with these models include the assumption of a uniform community identifiable and recognisable by its unique and shared culture,[3] the tendency towards a problematic cultural relativism and the possible sanctioning of oppression of other groups justified through "culture,"[4] and finally the deferral of individual human agency, subject to the group. Nevertheless, human rights are considered to present significant potential for traditional knowledge protection:

> The imbalances in the intellectual property law system have been created and are sustained by established mechanisms of accessing the modern economic space and power. Indigenous and local people often experience insecure resource tenure, are financially weak, and lack institutional arrangements to safeguard their property rights. Thus, the issues extend to fundamental and more complex questions of human rights of the peoples.[5]

But are community resources human rights?

Recognising Culture

As it stands, the discourse of minority rights presumes a "right" to culture as a rational decision, a further economy of exchange, available to the individual within a democratic society. The right to culture is almost a freedom of self-expression, rather than a right to community, as such. Similarly, Indigenous rights are threatened by presumptions of physical place ("Indigenousness") and the classical ethnographic attachment to views of colonisation and oppression as historical (and possibly temporary). As the previous chapter showed, this poses significant problems in asserting rights to land where that colonisation process has seemingly "ended", and

[2] Howard R (1992): 81-102; Donnelly (1998): 153-63.

[3] Gellner (2001): 177-200.

[4] Douzinas (2000): 137; Fraser (2003): 92.

[5] Mugabe (2001): 16.

furthermore suggests that Indigenousness can cease, as it were, once the effects and oppression of colonisation are over. Indigenousness becomes an almost political position in this rhetoric, where land is an object of dispute, rather than an ongoing cultural and social community. Similarly, concerns with assimilating community resources within conventional notions of the right to self-determination persist, where self-determination continues to be linked to the process of decolonisation and therefore potentially a "temporary" right.[6] Indeed, the "mythology" of the Indigene is all the more powerful given the lack of agreed definitions of "Indigenous" in international law. These problems with the term were considered in the Introduction to this work, and have been in play throughout, but nowhere do they seem more critical than in the application of human rights frameworks.

These constructions of culture within human rights discourse, whether as minority rights or Indigenous rights, have been criticised for neglecting what might be understood as a critical and fundamental duty of respect for cultural diversity,[7] the fundamental obligation at the centre of the concept of community resources.

How might cultures be recognised in order to trigger this obligation on the part of the international community, for the purposes of the model of community resources?

[6] Note the arguments to this effect put forth by India in their reservations to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the objection to these reservations made by Germany, discussed in more detail below. See also Wright (2001): 153-59.

[7] Tully (1995). See also the concerns with what she describes as the move away from multiculturalism and pluralism in the law of self-determination, in Wright (2001): 153.

Minor(ity) rights

Are minority rights human rights?[8] The relationship between community (or cultural rights as it were) and minority rights is a difficult one. While some suggest that minority rights are indeed human rights,[9] others have noted the deliberate omission of minority rights from the Universal Declaration of Human Rights (UDHR)[10] on the presumption that "culture" can be realised through individual rights to practise one's culture. The assumption persists that community is a collective and uniform "self," and that collective cultural practice comes from the individual right to engage in that culture as a separate and almost rational decision.[11]

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) continues the emphasis upon the "individual" agent in human rights law:

> In those States in which ethnic, religious or linguistic minorities exist, **persons belonging to** such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[12]

Article 27 appears to introduce group cultural rights; however, it defers the authority and capacity of communities and interprets culture through the right of the individual,

[8] Some commentators have argued that minority rights cannot be understood as human rights, citing the individualistic nature of the human rights framework as inadequate for dealing with minorities. For instance, see Donnelly (1989); Donnelly (1998): 155-56. The recent report of the NGO, Minority Rights Group International, *Gender, Minorities and Indigenous Peoples*, has also identified the problematic nature of human rights discourse and discrimination laws, particularly in terms of a classificatory imposition upon discrimination, and argues for the importance of a more holistic and multi-dimensional approach to rights-based protection of minorities: Banda & Chinkin (2004).

[9] Morsink (1999): 1053-60.

[10] Freeman (2002): 114.

[11] This occurs in a way similar to that criticised with respect to freedom of expression, where discourses surrounding the freedom of expression suggest an almost proprietary relationship to one's speech and expression, thus implying the capacity to divest oneself of that relationship to expression, in ways completely incompatible with the relationship identified between community and resources. In particular, see the discussion in Nancy (1993b), regarding the way in which freedom is figured competitively and proprietarily, as distinct from being always and already prior to the construction and production of individual subjectivity. See also Douzinas (2000).

[12] ICCPR, Article 27 (emphasis added). Full text available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

within international human rights discourse. While mentioning community, it is in terms of community as collective, as something "in common," and the rights to be enjoyed are effectual nevertheless in an individual capacity. Article 27 does not "recognise" minorities as such but only those individuals belonging to minorities. In other words, Article 27 recognises human rights of individuals belonging to a minority, but not the basis for rights in community resources. Similarly, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities maintains this similar construction of rights as individual and not as group.[13]

A further problem that has been identified is the construction of minorities as an issue to be decided (and indeed recognised) by states. Not only may states choose not to recognise minorities, but also they are vested with the negative duty of non-interference, rather than a positive duty toward the facilitation of cultural diversity.[14] Indeed, the possibility of a positive duty may in fact be critical to the development of adequate and effective legal frameworks for the protection (and indeed promotion) of traditional knowledge through community resources.

The key organising principle of human rights frameworks continues to be influenced by the historical foundations of human rights law, and the preponderance of theories of liberal democracy and the common good:

> The political theory of liberal democracy was not designed historically to solve problems of cultural minorities. The classical conception of democracy entailed the rule of a culturally unified people. In the influential theory of eighteenth-century French philosopher Rousseau, any cultural differences that might exist in society should be subordinated to the "general will" of the

[13] Freeman (2002): 115.

[14] Freeman (2002): 115.

> people. Locke's liberal theory was designed to protect the natural rights of individuals through government and the rule of law.[15]

The necessity and indeed the risk of human rights law is the presumption that all individuals are equal before the law, that there is unproblematic equality of all right-holders. This fundamental presumption of human rights principles therefore legitimates and justifies the discourse of natural rights to rewards for creativity, and of freedoms, including the problematic freedom of expression explored in previous chapters. The apparent inalienability and ahistoricity of human rights discourse disguises the possible bias in those objectives, considered in earlier chapters in the context of intellectual property and self-expression. As the earlier discussion of intellectual property creation suggested, there is no ethical duty attached to the creation of that "property," only administrative criteria to determine what fulfils the definition. Similarly, human rights rhetoric justifies individual pursuit of personal rights, but does not necessarily provide a consideration of the ethical context in which to pursue those rights.[16] This is particularly relevant to the discussion of freedom of speech and expression, and the relentless pursuit of self-expression, as it were, where responsibility to the other does not necessarily figure at all.

Similar problems regarding the summation of people under the "common good" were identified in respect of biodiversity, considered in Chapter 6. In the global ecological risk narrative of biodiversity, the will of the people persists in the concept of "national sovereignty," where the sovereignty of the nation-state "logically" and "rationally" overcomes the possibility of community management of natural resources in a local group. This apparent conflict between community resources and state-conferred rights

[15] Freeman (2002): 115.

[16] See for instance the discussion of the rigidity of rights, Sunstein (1995): 730; see further the criticism of the lack of emphasis on duties in Freeman (2002): 41.

reinforces the argument that community resources, more appropriately, should operate as an international obligation to cultural diversity rather than as rights to cultural commodities created and regulated by the state. Furthermore, as considered in earlier chapters, the threats to community may indeed arise through antagonistic and imbalanced relations with the nation-state, making international governance, as suggested elsewhere in this work, a more appropriate and relevant realisation of community resources for Indigenous and traditional groups. Such administration could be vested in the UN Human Rights Committee,[17] in an effort to balance the interests of communities and individuals, though not necessarily identifying community rights as human rights.

Within the framework of human rights, clearly communities may be compromised, even if the human rights of individuals within those communities are not threatened in any way.[18] Nowhere is the problematic subsuming of community resources within a human rights framework clearer, perhaps, than in the opposition of specific traditional knowledge protection with arguments of freedom of speech, natural rights to property, and just rewards for creativity. The grand narrative of innovation by which these arguments continue to be legitimated and circulated as common sense, continues to justify itself through references to human rights in creativity, but not community rights in culture. Indeed, arguably an adherence to human rights risks inadvertently justifying the ongoing exploitation of traditional knowledge in the name of self-expression, particularly through this construction of minority rights in competition with individual rights.

[17] Kymlicka (1995): 169.

[18] Kymlicka (1995): 4-5. However, the work of Kymlicka and others has been criticised for recognising rights only in those minorities considered to be liberal. See Chaplin (1993): 39-46.

Indigenous Rights

The rights of Indigenous peoples were first formally recognised in 1957, with the International Labour Organization (ILO)[19] Convention No 107.[20] This significant international instrument nevertheless perpetuated the logic of assimilation, proposing the recognition of Indigenous people through their rights as citizens rather than cultures. It was rejected and amended in 1989 to produce Convention No 169,[21] which was adopted without the participation of Indigenous stakeholders. The major concern was the way in which the state was ultimately vested with the responsibility for Indigenous groups and cultures, provoking the development within Indigenous groups towards rights of self-governance and self-determination and calls for these rights to be recognised by nation-states and international law. Despite the substantial criticism of the relationship to place and territory in modern applications of the right of self-determination, as will be discussed, the principle of self-determination has remained perversely attached to the discourse of decolonisation and, implicitly, to the discourse of race.

1. The Right to Self-Determination

The principle of self-determination first appeared in the Charter of the United Nations,[22] and subsequently in both the ICCPR[23] and in the International Covenant on

[19] The International Labour Organization (ILO) is a UN specialised agency dealing with labour and human rights. Created in 1919 through the Treaty of Versailles, it became the first UN specialised agency in 1946. http://www.ilo.org/public/english/about/index.htm

[20] The ILO Convention No.107, Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries was signed 16 June 1957 and entered into force 2 June 1959. With the conclusion of the ILO Convention No 169 in September 1991, the Convention was closed to further ratifications, ceasing to apply to all states which ratify No 169.

[21] The International Labour Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries was adopted 27 June 1989 and entered into force 5 September 1991. http://www.unhchr.ch/html/menu3/b/62.htm

[22] UN Charter Article 1(2), and Article 55, http://www.unhchr.ch/pdf/UNcharter.pdf

[23] Article 1, full text at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

Economic, Social and Cultural Rights (ICESCR),[24] and in several other international instruments,[25] but the problems of identifying those entitled to self-determination and indeed the nature of the principle itself persist:

> Is it then, a goal, an aspiration, an objective: Or is it a principle, a right? And if the latter, is it only a moral and political right, or is it also a legal right? Is it enforceable? Should it be enforceable?[26]

Fundamental to the recognition of right-holders is the feature of "place" or physical land, and critically, the integrity of the boundaries of that land. Indeed, the principle of or right to self-determination, particularly in its early incarnation, suggests a finite process of decolonisation:

> Controversy surrounds self-determination as an international legal principle. It has been argued that it only properly applies to situations of colonial rule or foreign domination and is almost obsolete. Particularly if manifested as a claim of secession, self-determination challenges the notion of territorial integrity and the international community has been slow to support claims made outside a European colonial context.[27]

The continuing influence of the defining principle of decolonisation was explicitly identified in a reservation made by the Government of India to Article 1 of the ICCPR and ICESCR:

> With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to

[24] Article 1, full text at http://www.unhchr.ch/html/menu3/b/a_cescr.htm

[25] The Declaration on the Granting of Independence to Colonial Countries and Peoples, Articles 1, 2, 4, and 7. Adopted by General Assembly Resolution 1514(XV), 14 December 1960, http://www.unhchr.ch/html/menu3/b/c_coloni.htm; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, Articles 1 and 3. Adopted by General Assumbly Resolution 2625(XXV), 24 October 1970, confirmed in 2003 in "Promotion of peace as a vital requirement for the full enjoyment of all human rights by all," Commission on Human Rights Resolution 2003/61, adopted 24 April 2003. http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.61.En?Opendocument

[26] Stavenhagen (1993): 12.

[27] Charlesworth & Chinkin (2000): 152.

> sovereign independent States or to a section of a people or nation which is the essence of national integrity.[28]

1.1 External self-determination: the Saltwater Principle

The persistence of place presents itself in a fundamental way in the early development of the right to self-determination, and in the temperance of full rights to self-determination. Where Indigenous peoples were displaced by groups from within their boundaries as determined by sea, not by culture, then the right to self-determination need not be formally recognised. The right was restricted to those peoples with "saltwater" separating them from their colonisers. Thus, the integrity of the community demands a physical marker, under international law, before the right to self-determination of culture is applied. The UN Draft Declaration on the Rights of Indigenous Peoples[29] explicitly rejects this distinction, but notably this Declaration remains in draft form and there is almost uniform reluctance to implement its provisions at the national level.[30]

In the current historical context, the right to self-determination appears to depend on an overt visibility of the struggle. Where self-determination is considered to have "occurred", the protection of the rights will be through the mechanism of the human rights of individuals.[31] Human rights are international obligations of states and the international pressure to observe those rights (of individuals) is exerted necessarily upon states and not between individuals. Thus, human rights are rights to individual integrity that are in the national interest, as it were, and are thus necessary towards the

[28] Full text of all objections and reservations http://www.unhcr.bg/bglaw/en/intern_covenant_economic_en.pdf. This reservation was objected to by Germany, which argued that this attenuation of the principle of self-determination would be contrary to the principles of the two Covenants. Objection by Germany available at http://www.unhcr.bg/bglaw/en/intern_covenant_economic_en.pdf

[29] UN Doc. E/CN.4/Sub.2/1994/2/Add.1. 20 April 1994.

[30] Wright (2001):

[31] Charlesworth & Chinkin (2000): 153.

development and integrity of, and peaceable association between, nations. The individual is connected to the international social whole through the operation of national obligations to human rights, but this model may indeed render illegitimate, any effective local autonomy (both of the individual and of the collective).

Arguably, this principle of "recognition" for the purposes of the right to self-determination has much in common with nineteenth-century anthropology and racial essentialism, where difference was compartmentalised and registered as "pure," and therefore readable and manageable. Where there is no intrinsic geographical separation of cultures, no "cultural organicism," no "long past" to warrant the right to self-determination, its recognisability may be in question.[32] Not only may loss of place deny community rights to land, but "lack" of individual place may deny community rights to culture. Culture, it seems, requires similarly uniform and simplistic narration in international law, as innovation does in intellectual property law. Thus, the right to self-determination risks homogenising the Indigenous group, generalising group interests and individual participants such that the right effectively becomes that of the individual "self" of that group: "The principle of self-determination is usually discussed as if there were a single relevant 'self,'"[33] whomever that might be.

Through the attachment to the historical events and process of colonisation, and the stark application of geographical markers in the form of the saltwater principle, the right to self-determination fixes the identity of groups that are defined by historical and physical markers of local community, undermining the capacity of the community to develop and evolve geographically and otherwise. The traditional management of

[32] Bhabha (1990): 4.

[33] Charlesworth & Chinkin (2000): 162.

resources, on the other hand, reflects not merely a local community's capacity for collective self-determination, but a citizenship beyond the politicised "object" of the "Indigenous community."

In fact, the reluctance to adopt the provisions of the UN Draft Declaration on the Rights of Indigenous Peoples could in part be attributed to the persistence of this original interpretation of self-determination, and the threat of secession, based upon the discourse of colonisation and race.[34] That is, self-determination in this sense is external to the state, as it cannot co-exist with the nation-state, but ultimately demands secession. In this way, the principle of self-determination re-affirms the centrality of the state in international human rights discourse, as the organising and governing principle of the "common good" of human rights.[35] However, with the increasing recognition and complexity of "community," the centre cannot hold.[36]

1.2 Internal Self-Determination: Becoming Territory

Are minorities entitled to self-determination?

Internal self-determination can be understood as a governing principle for community resources. Indeed, community resources can be recognised as part of the intrinsic means by which to achieve internal self-determination.[37] While secession may nevertheless be relevant to particular groups, internal self-determination captures the

[34] Wright (2001): 137-38. Note also the "blind spot" to self-determination, described in Charlesworth (1998): 79-80.

[35] Koskenniemi (1994): 241-269.

[36] An acknowledgment of African author, Chinua Achebe, and his re-writing of colonial discourse in *Things Fall Apart*, acutely relevant here. The title of his novel is drawn from Yeats' poem "The Second Coming": Achebe (1958).

[37] Hill (2000). See also the discussion, for instance, in Correa (2002) regarding the protection of traditional knowledge as compatible with accessing the right to self-determination, where such protection gives the community control over resources, and "Such control may be an element of self-determination and collective cultural sovereignty" (45). In this regard see also the Mataatua Declaration (considered again later) and the UN Draft Declaration (Articles 29) where rights to cultural and intellectual property are presented as elements of the fundamental right to self-determination.

cultural and customary practices of community, while overcoming the troubling attachment to land and place[38] that introduces property norms, potentially undermining community through this invocation of geo-historical parameters. Unlike the desire for secession understood by external self-determination, the right as "internal" suggests customary self-government within the nation-state, and therefore according to the general political structure of that state.[39] In this way, the principle introduces the nexus between customary law and international relations that is necessary to realistic interaction between traditional knowledge protection and intellectual property, of critical importance to the model of community resources. The so-called third-generation rights to self-determination are understood as rights to cultural self-determination, which are of the greatest application in the present discussion.

In the reference to "internal," this stage in self-determination may be understood as moving beyond state boundaries, recognising a "cultural" right to self-determination,[40] and addressing the autonomy of community limits in the face of national sovereignties.[41] Nevertheless, despite this evolution of the right beyond

[38] Understood as "territory" in human rights law, this kind of territory is quite distinct from the concept developed in the previous chapter, and suggests the physical and rivalrous process of boundary-making.

[39] See for example the criticism of an ongoing link between the right to self-determination and independent statehood in Anaya (1993). Arguably, however, the concern with the concept of self-determination in the present work, as will be considered in detail, is the ongoing implication of processes of decolonisation and the attachment to "indigenousness" as distinct from an explicit rendition of the right as a right to secession.

[40] See for instance Tennant (1994); Hill (2000); Díaz-Polanco (1997).

[41] Although beyond the scope of this work, it is useful to note here phenomena such as the Fourth World Movement, in the context of "cultural" and Indigenous nations. See for instance, the Fourth World Dialogue at the CWIS, "World War and the Fourth World." http://www.cwis.org/fwdp/International/289%20Fourth%20World%20Dialogue%20Prg%201-0311.pdf. Similarly, various Indigenous peoples recognise themselves as "nations," including the Sámi nation, which encompasses the Sámi people of Norway, Finland, Sweden, and Russia, see http://www.itv.se/boreale/samieng.htm; the Kurdish Nation, http://www.kurdmedia.com; Québécois nation, see the policies of sovereignty of the political party Bloc Québécois at www.blocquebecois.org.

territory as place and towards culture and tradition, the construction of claims continues to refer to notions of "indigenousness" and place, and therefore the spectre of colonisation.[42]

Of particular relevance to the recognition of a right to internal self-determination is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.[43] While this Declaration does not refer to self-determination explicitly, it sets out the principles underlying internal self-determination. Of utmost importance is the UN Draft Declaration on the Rights of Indigenous Peoples,[44] which clarifies the right to internal self-determination regardless of the loss of territory, displacement, alienation, or dispersal of groups.[45] The provisions in this document are critical to the development of community resources, but their application in international human rights law remains an aspiration.[46] Of particular interest to the concerns regarding the definition of "Indigenous" raised earlier, this document, adopted without vote by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[47] shows the relationship between internal self-determination, and the production of place, of territory, of "Indigenousness", as it were, through

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This assertion of nation-hood is also relevant to rights to self-determination claimed by non-state populations, and the political legitimacy of those rights.

[42] Sieder & Witchell (2001): 205.

[43] Adopted by General Assembly Resolution 47/135, 18 December 1992. Text available at http://www.unhchr.ch/html/menu3/b/d_minori.htm

[44] United Nations Draft Declaration on the Rights of Indigenous Peoples

[45] See further the discussion in Foster (2001).

[46] Elsewhere Article 3 has been criticised as "no more than a restatement of the right to self-determination that already exists under Common Article 1 of the Covenants": Wright (2001): 137.

[47] The ECOSOC changed the name of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Sub-Commission for the Promotion and Protection of Human Rights. Established in the first session of the Commission on Human Rights, 1947, under the authority of the ECOSOC, the Sub-Commission is the main subsidiary body of the Commission and is composed of 26 experts acting in their personal capacity. The Sub-Commission has 6 working groups, including the Working Group on Minorities and the Working Group on Indigenous Populations.

community. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)[48] is especially important for explicit identification of the relationship between rights to cultural and intellectual production and the self-determination of collective identity, notwithstanding the ongoing construction of that identity with respect to an "indigenous" sense of place. The African Charter on Human and Peoples' Rights,[49] adopted in 1981 by the Assembly of Heads of States and Government of the Organization of African Unity, guarantees a right to self-determination under Article 20, as "unquestionable and inalienable," and refers to the right of colonised or oppressed peoples "to free themselves from the bonds of domination by resorting to any means recognized by the international community." Importantly for the purposes of community resources, the Charter recognises the right whether the domination is "political, economic or cultural."

While so-called third-generation rights to self-determination may seem immediately relevant to the protection of traditional resources, the status of a right to internal self-determination remains unclear.[50] The principle of internal self-determination may not be adequate alone to deal with communal management and control of traditional resources, but nevertheless remains an important basis upon which to build the concept of community resources and to resolve protection within an international agreement.

[48] First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatana, Aotearoa, New Zealand, 12-18 June 1993.

[49] The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. The full text of the Charter is available at http://www.africaninstitute.org/html/africancharter.html

[50] Falk (1997): 55.

2. Community Resources – Determining Knowledge, Determining Self

The "emerging law of participation," identified in the *Western Sahara* case by Counsel for Algeria, is noted by some as lending greater legitimacy to modern laws of decolonisation.[51] This "law of participation" is immediately relevant to the development of an international agreement on community resources, most importantly in its commitment to the means of expression for diverse groups, and its concern as to "whether these groups have a voice in the process."[52] Resonating with the freedom of expression considered in earlier chapters, with respect to community access to the integrity of its knowledge, the law of participation may support the fundamental concepts of community resources and respect for cultural diversity. As Knop argues, "Not only did modern international law therefore have greater legitimacy generally than classical international law, the right of self-determination carried even greater legitimacy within modern international law because it entitled peoples, as well as states, to participate."[53]

Similarly, in order to achieve genuine justice for traditional and Indigenous peoples, individual communities must achieve the capacity and authority to participate as communities in order to maintain the resources themselves. In other words, intrinsic to the proper and genuine protection of resources is the management by communities of themselves and thereby their resources according to customary law, as a fundamental realisation of genuine self-governance. "Traditional knowledge" is not a static knowledge object, but part of this relationship between communities, members, and the knowledge process.

[51] Knop (2002): 161.

[52] Knop (2002): 4.

[53] Knop (2002): 161-162.

Despite the apparent importance to community resources, the law of participation carries with it the problematic jurisprudential and political history of decolonisation. It is difficult to predict whether it would be interpreted as justifying and legitimating community resources, particularly with respect to valuable "national" resources, within the principle of self-determination. Drawing upon discussions in the previous chapters, it may be that the international community would recognise the right to manage resources according to customary law as a right to internal self-determination, following an autonomy-based justification of rights to resources as integral to identity.[54] Indeed, the right to self-determination may motivate the necessary legitimacy for the system of community resources. Significantly, however, where there is no overt visible conflict, the way in which community might register or indeed be recognised, is unclear.[55]

Furthermore, the right to self-determination is not necessarily effective in the protection of traditional resources if the traditional management of resources is seen as challenging national interests.[56] While the principle of self-determination arguably is developing beyond preoccupations with territory and towards the kinds of interests at stake in community resources, the ways in which these developments might be applied continue to be uncertain.[57] Indeed, some critics argue that despite the

[54] Stenson & Gray (1999): 183-85.

[55] Note the important critique of the principle of self-determination as "imprecise and ill-defined" in Canas & Cardenas (2001): 102. See also Wright (2001): "Self-determination and nation building have largely adopted the European model of the state as their goal, partly in order for newly emergent states to achieve acceptance within the international community as genuinely equal and credible subjects" (184). See also Otto (1996). See further Wright's critique of self-determination in the context of nomadic groups and agrarian land use: Wright (2001): 148.

[56] Wright (2001): 153-54.

[57] See for instance the discussion in Brilmayer (1991). See also Kelman (1997), where the relationship between national identity and claims to self-determination is examined.

emergence of this concept, the right to self-determination remains framed by concerns with decolonisation and conventional notions of national identity:

> Self-determination is increasingly based on monocultural ideas about national identity founded on cultural or religious differences between states with an emphasis on the central importance of often authoritarian state structures … Ideological doctrines or adherence to democratic values seem to make little difference to this increasing tendency towards cultural homogenisation.[58]

Similarly, as considered earlier, the importance of international trade relations is one of the considerations put forward by the IGC in favour of protection based on intellectual property models rather than a separate *sui generis* regime, where biodiversity is interpreted as a trading advantage of developing and least-developed countries, justifying protection of traditional knowledge as a consolidation of that advantage.[59] Given this perspective upon the resolution of traditional knowledge protection, relying upon the right to self-determination might be defeated where the exercise of that right is considered by the international community to be incompatible with national interests, and indeed contrary to the stability of the genuinely representative government of a sovereign state.[60]

The conventional notion of the achievement of the right to self-determination is described as an external and "single event," and subject to existing state governance structures.[61] Until the emerging right to democratic governance is established within international law, facilitating an ongoing "internal" right to self-determination,[62] it is unlikely that the right to self-determination will be adequate (or indeed recognised as

[58] Wright (2001): 153.

[59] WIPO/RT/LDC/1/14 (September 29, 1999): Paragraph 10. See also WIPO/GRTKF/IC/4/8 (30 September 2002): 9.

[60] Kirgis (1994).

[61] Charlesworth & Chinkin (2000): 153.

[62] Charlesworth & Chinkin (2000): 153-54. For instance, the UN Draft Declaration relies strongly upon the right to self-determination in its "internal" incarnation, yet interestingly it remains in draft form.

legitimate) as the basis for the protection of traditional resources. Even if legitimacy were bestowed upon community resources as an expression of self-determination, this emerging right continues to subjugate community integrity to public democratic government, and arguably remains irrelevant in the context of cultural expression, regardless of its status in international law.[63] To be useful in the present context, the principle must be enlivened with the promotion of minority rights and effective local governance through cultural and traditional expression. Self-determination may provide certain motivations for *sui generis* protection, but arguably cannot be relied upon alone, as a principle of international law, to facilitate community authority with respect to traditional knowledge, for the purposes of the model of community resources.

Community Rights?

1. Wilful Stupidity or Ideal Non-sense?

Human rights discourse, therefore, in its invocation of the ideal or average subject, and its re-affirmation of conventional notions of identity and self-hood, nevertheless implies the problematic perspective upon individual identity and freedom examined in Chapter 5. In this way, an attachment to the discourse of human rights risks the re-instatement of the same commonsensical rendering of western notions of self and property seen in intellectual property law. In the legitimate pursuit of self-expression, and in particular the freedom of that expression, which justifies individual obstructions to community, relying solely on the principle of self-determination to conceptualise community resources may be inadequate.

[63] Charlesworth & Chinkin (2000): 154.

In addition to these concerns, arguably a human rights framework depends upon the kind of "deprivation" of the local, of community (seen in Chapter 1), that occurs throughout sociological analyses of community as somehow incompatible with the construction of individual subjectivities.[64] Indeed, to challenge human rights norms and their application to community seems illogical, irrational, almost amoral. Human rights, like intellectual property law, just make sense:

> [T]o maintain that these core human rights are only rights for atomistic individuals requires something approaching wilful stupidity. They are rights that contribute greatly to the flourishing of communities, whether they are religious, political, or "lifestyle" communities.[65]

Perhaps the cacophony, un-originality, and illegitimacy of community does indeed betray a stupidity or informality, but necessarily the concept of community resources must resist the force of the grand narrative. The problem with the charge of "wilful stupidity" is that it presumes an unproblematic generalisation of community according to qualitative and physical characteristics. Fundamentally, it presumes a collective, a community based upon unfettered open access, without consideration of the significant role of differentiation and customary organisation of that access. To presume human rights are unproblematically reconcilable with community autonomy risks the suggestion that justice is achieved through unfettered freedom, without considering the duties accompanying those freedoms, nor the circumstances required in order to make those freedoms possible. Buchanan also goes on to consider group rights, but these are suspiciously "corporatised" rights of the uniform state and of the corporation in private international law.[66]

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[64] Bauman (1997): 33.

[65] Buchanan (2004): 157.

[66] Buchanan (2004): 157.

Is such "corporatisation" necessary in order to make sense of community? Is a human rights framework equipped to protect a community, as distinct from a group of individuals? As discussed, human rights protect the integrity of the individual, through the transnational articulation of obligations beyond the individual's nation-state. In the classification of communities as subjects of those rights, they are individualised, interpreted through components of ethnicity and race (Indigenous or minority?), colonisation, and history. Is it possible, therefore, that a human rights framework can be recuperated to account for community without fundamentally excluding that community from itself and from the very framework attempting to further its rights? Towards the model developed in the next chapter, it may in fact be necessary not to generalise individual communities, but to assert a fundamental concept of community in this context. Only in this way, can the appropriation of traditional knowledge, through the international discourse of intellectual property law in particular, be resisted and transformed.[67]

How the individualistic model of human rights may be effective in the protection of the customary and traditional integrity of the community, however, is difficult to imagine.[68] Human rights protection proceeds from the recognition of those rights in individuals within the community, to be asserted by those individuals or by the state on behalf of individuals, and not with reference to the collective subjectivity and integrity of the community. Furthermore, human rights have the popular appearance of irrefutable common sense, of naturalness, where legislation to protect those rights is merely an essential response to what already exists. But of course, these rights are a

[67] See the notion of a "universal community" in Hardt & Negri (2000): 206-207.

[68] On the difficulty of Indigenous and traditional communities accessing international law in a genuine communal sense, see Charlesworth & Chinkin (2000): Chapters 3 and 4. See also Franck (1995) and Tierney (2002) who provides a useful reading of the coherence and legitimacy of self-determination, in the context of Franck's work.

fairly recent invention of international law. Human rights are in fact historical constructions in response to the claim or assertion of one's difference as coming within the ambit of protection, and their protection by nation-states is purely on a voluntary basis. Therefore, the framework necessarily presumes an average human, as it were, and that all approach the framework of human rights from the same perspective and direction.

A human rights model does not translate effectively to the community, other than by fixing upon its members, and therefore upon historical and physical instances of the community. This is contrary to the realisation of the community as an effective holder of rights regardless of changes to its constitution through changes in individuals, possibly unrecognisable in respect of its resources. It is difficult to understand how local Indigenous and traditional communities might access rights to self-determination and cultural integrity with respect to their valuable resources, under these conditions that require individuals to refer to a centralised international interest dislocated from their local context and necessarily fragmenting instances of communal integrity. Indeed, the mechanism of international human rights is operated by international "moral" pressure upon individual states, as it were, and the upholding of those rights is generally motivated by the national interest of international relations.

Historically the creation of human rights, and indeed the protection and enforcement of those rights, depends upon the assertion of difference enjoyed by the individual, albeit within a community of individuals. That difference cannot be asserted in and of a community itself within the paradigm of international human rights law, because the rights necessarily vest in individuals as a group, rather than in anything unique about

a particular community. Thus, the claim to a human right depends upon the argument and proof that individual difference comes within the ambit of protection:

> Not every difference has the same value, and some ways of life and forms of togetherness are ethically superior to others; but there is no way of finding out which is which unless each one is given an equal opportunity to argue and prove its case.[69]

The community cannot express itself, cannot make itself recognisable within this framework that recognises only the individual being.

Zygmunt Bauman notes that "human rights" effectively grant the individual the right to recognition of her difference, and so necessarily those rights are enjoyed separately.[70] While that recognition theoretically may extend to the right of a community, in international human rights law the litigation and manifestation of a right is on the basis of the individual assertion of that right, whether that is the human individual or the generalised "self" in the determination of the collective. Bauman identifies the paradoxically communal nature of the assertion of difference in order for a right to be created, but the ultimately individualistic operation of and claim to rights:

> In order to become a 'right', difference needs to be shared by a group or a category of individuals numerous and determined enough to be reckoned with: it needs to become a stake in a collective vindication of claims. In practice, however, it all comes down to control of individual movements.[71]

The "difference" upon which a right may be based is necessarily individual, but shared by those individuals within a community: "Whenever the question of

[69] Bauman (2001a): 79.

[70] Bauman (2001a): 76.

[71] Bauman (2001a): 76.

'recognition' is raised, it is because a certain category of people considers itself relatively deprived, and views that deprivation as groundless."[72]

According to Bauman's analysis then, the success of any assertion of the deprivation of Indigenous and traditional communities (whether this is with regard to custom and tradition, natural resources, land, artistic works, and so on) within the modern litigation of human rights, will be measured in the context of the simultaneous condition of other categories of people.[73] It is not the figure or authority of the community that is necessarily relevant to human rights litigation, but the normative significance of the individual as measured against perceived desires and participation in society, where "the pursuit of happiness could not but turn sooner or later from a mere opportunity into a duty and supreme ethical principle."[74] A human rights framework remains driven by an individualist and materialist model and does not, therefore, provide an adequate framework for the recognition of the capacity and authority of the community with respect to the full and complete assertion of the rights and values of traditional and Indigenous communities.

In his development of the concept of the "individualisation" of society, Bauman identifies the way in which the public interest and public space have become dominated by preoccupations with the private:

> If the individual is the citizen's worst enemy, and if individualization spells trouble for citizenship and citizenship-based politics, it is because the concerns and preoccupations of individuals *qua* individuals fill the public space, claiming to be its only legitimate occupants – and elbow out everything else from public discourse. The 'public' is colonized by the 'private'; 'public interest' is reduced to curiosity about the private lives of public figures …

[72] Bauman (2001a): 81.

[73] Bauman (2001): 83.

[74] Bauman (2001a): 83.

> 'Public issues' which resist such a reduction become all but incomprehensible.[75]

This is similar to the observations made earlier regarding intellectual property and the increasing influence of private (commercial) interests upon the development of the law. Bauman suggests that the human rights model is necessarily applied through this process of individualisation,[76] thus compromising and ultimately defeating the significance of community. This would suggest that the principles and applications of international human rights would be inadequate to assert the unique value and relationship of Indigenous and traditional communities in resources and to address that deprivation collectively: "Once grievances lose their collective character, one may also expect the demise of the 'reference groups' which have served through modern times as the benchmark against which relative deprivation has been measured."[77]

Despite the "collective vindication of claims," to use Bauman's phrase, rights are manifested in individual experience and assertion.[78] From the point of view of traditional resources, the paradigm does not necessarily accommodate an assertion of difference based upon communalism, where the community may indeed be the recipient of rights and continues to enjoy those rights, regardless of its membership. The identity of community, as explained earlier, is not that of particular individuals within the group, nor a geographical attachment to place,[79] but is the recognition and

[75] Bauman (2001b): 49-50. This observation resonates with the current debate over the public interest, intellectual property rights, and creativity. For instance, see Picciotto (2002).

[76] Bauman (2001a): 86.

[77] Bauman (2001a): 86.

[78] Bauman (2001a): 76.

[79] The attachment to place is a potentially significant feature of the definition of community as envisaged by possible legal regimes. The IGC notes that, in determining the ownership of rights under such a regime or *sui generis* elements of intellectual property protection, "it may become then

relationships between individuals within that community. Any right to assert difference must be based upon a mutual recognition of belonging between the individual and the community.

There remains some doubt then as to the ability to secure protection for Indigenous and traditional resources through international human rights norms, particularly the preservation of the right to self-determination and cultural integrity.

Are community resources in the "national" interest of a global civil society?

2. Regional Reinforcement of Globalisation

Despite the nationalism of trade policy, the liberalisation or globalisation of trade is identified as increasing the benefit to, and enhancing the welfare of, countries trading within that world market.[80]

> For these reasons successive Australian governments have been strong supporters of the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT). There is a direct link between Australia's interest in an effective multilateral trading system and the Government's wider policy agenda focusing on delivering economic growth, more jobs and better living standards for all Australians.[81]

However, this linkage between economic growth and welfare must be examined and questioned. Common to the rhetoric of integration, supporting the trade-off between civil rights and international objectives, is the notion of the "global civil society."[82]

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necessary to establish a system of geographical and administrative definition of communities": WIPO/GRTKF/IC/4/8 (30 September 2002): 25. This must be addressed in terms of the potential limitation to the integrity of Indigenous peoples and traditional communities, particularly if such communities are able to evolve and develop, as considered an essential part of tradition by the IGC.

[80] Hoekman & Kostecki (2001): 28.

[81] Department of Foreign Affairs and Trade, "Australia's Relationship with the World Trade Organization (WTO)" Submission to the Joint Standing Committee on Treaties, September 2000, at 3.

[82] The phrase "global civil society" refers to the globalisation of the Hegelian "civil society," which sought to characterise the social (or indeed ethical) character of the market economy: Wood (1991): xviii. The concept suggests the international interdependence of citizens and the globalisation of values of civilised, ethical, moral society. The coining of the phrase can be traced back to the late 1980s and early 1990s: see the discussion in Keane (2003). Global civil society therefore is a useful way in which to understand the construction of community resources within an international framework in order to

But in the context of globalisation, to what do individuals within this global civil society refer? What is the international state around which this society is structured? A global civil society may be possible where there is a cohesive system of states coordinated through a centralised power, but this power is increasingly that of westernised objectives: "The emerging global state of the late twentieth century is therefore the Western state together with its legitimating framework, the UN system through which other states and – to a lesser extent – world society are drawn into political relationships with it."[83]

While it may seem that human rights therefore form the important basis for this global civil society,[84] the centralisation of power necessarily calls into question the potential for conventional "human rights" models to account for and protect traditional knowledge. Through the individualisation of society identified by Bauman, and the "shrinking" of the public domain through this process,[85] the discourse of human rights becomes increasingly and problematically appropriated by arguments for the exclusive nature of private property and self-possession, without fully appreciating the attending obligations or duties towards the collective society:

> The law of private property rules supreme. In this climate taxation is depicted as the confiscation of what is properly our own – an intolerable burden that should be reduced. The social, the collective and the public realm are portrayed as the enemies of prosperity and individual autonomy and, worse, are opposed to the moral basis of society, grounded as it should be in the

address the often problematic relationship between community autonomy and its subjection to the national sovereignty. For further discussion and critique of the concept see also Kaldor (2003).

[83] Shaw M (1999): 217.

[84] Anderson-Gold (2001): 85.

[85] For instance, Will Hutton speaks of a "shrinking of the public domain" in US society that takes citizens away from community life to an increasing individualism: Hutton (2002b): 31. Note also the earlier discussion of freedom of speech, and the almost moral imperative to pursue that freedom regardless of the (ethical) context in which it is achieved.

> absolute responsibility of individuals to shoulder their burdens and exercise their rights alone.[86]

If protection of traditional resources is to proceed from international respect for cultural diversity and the dignity of Indigenous and traditional communities, rather than the more commonly deployed model of individual human rights, the "barrier between the entity of the state and those within it"[87] that is created by the role of the state in conferring rights and duties under international law, might indeed be overcome. Adequate protection and promotion of community resources would be achieved by the "immediacy" of obligations to diversity, the sources for which will be considered shortly, and by the recognition of the standing of communities with respect to resources. In recognising the mutual relationship between national interests and a global economy, such that national policies can drive international agenda, domestic governments must not overlook the significance of the Indigenous and traditional communities, or their obligations to the diversity of those communities and their intellectual interests, beyond their construction as mere commodities of trade.

A global civil society, therefore, motivates the deterritorialisation of local community, as it were, which paradoxically in turn engenders the kind of privatisation and individualisation that renders such a global collective impossible: "The ever onward encroachment of the market and its values has invaded and polluted the heart of the political process."[88] The centralised power to which the collective society refers is repeatedly embodied in property interests, and those possessing economic power are conferred possession of virtue and of selfhood as well, within a Lockean-style conception of independence and industry. Those without access to such power are

[86] Hutton (2002b): 6.

[87] Charlesworth & Chinkin (2000): 125.

[88] Hutton (2002b): 170.

demoralised and disenfranchised as illegitimate sources of knowledge, expression, and identity. Will Hutton provides an extensive consideration of the increasing movement away from that of a social view of property, to that of an individualistic view in the United States, whereby economic or market minorities are deemed without virtue and indeed deficient:

> It was this tradition that helped form the 1980s conservative dependency theorists and their view that welfare actively increases poverty which, rather than springing from social and economic processes, should be seen instead as rooted in the motivational and psychological deficiencies of the poor themselves. They do not do enough to help themselves.[89]

In its current use in contemporary party-political rhetoric, the concept of global civil society is a westernised society, polarised as western democracy and "other," premised upon the notion of access (to markets and to information). The process of globalisation is in turn imagined as driven by the disparity of information and the motivation to close the information gap. Globalisation is not just the expansion of the global market place, but is driven by the communication gap through a "global information society." In a globalised world, the state figures less as the defender of the public sphere, and more as an element within the public sphere of which the media is the democratic protector.[90] In this way, information itself is a value of civil society and the dissemination of that information, principally through the media as well as through more indirect means such as that of intellectual property law, is a civilising principle of the "global", attributing property values to the material forms of information, and defining selfhood for the international citizen.

Through the global mobility of information via international media systems, and the increasing mobility of people, the process of globalisation has led to the un-

[89] Hutton (2002b): 56.

[90] Giddens (2002a).

anticipated weakening and even collapse of States. Many critics have identified this weakening and the need to return politics to the people through effective de-centralisation and the participation of more localised autonomous groups. This return combined with government action (but not democratic action) above the level of the nation-state[91] has been described as "the democratisation of democracy".[92] But what might be an effective form for this local autonomy? And how might it be conceptualised as a legal actor with respect to the global civil value of property, specifically intellectual property, and more importantly, the management of traditional knowledge and resources? Does this raise the possibility of conceiving of "community" as a legal entity with the authority and capacity to manage its resources and knowledge?

With this is mind, it is possible to understand the state not as the public sphere in itself, but as a subset of the Aristotelian public realm, and as such, the custodian of the reality of publicness.[93] However, for the state to be an efficient process it has to be democratic, and in the face of globalising market values (including that of information as property), the state is being progressively privatised, thus diminishing the public realm, and diminishing the power and possibilities of people as individuals and, perhaps more importantly, as groups. Paradoxically, this process can also be said to compromise the dominion and legitimacy of states as protectors, and diminishing the responsibility to citizens, increasingly defined according to economic parameters of social value.[94]

[91] For example, the European Union.

[92] Giddens (2002a).

[93] Hutton (2002a).

[94] See the call for renewed intervention by the State in the protection of its citizens in Giddens (1998) and Giddens (2002b).

Therefore, noting this adherence to private property values as the cornerstone of a civilised society and of western notions of person-hood, the discussion is returned to the apparent insistence of legal institutions upon maintaining protection for Indigenous and traditional interests within conventional notions of property and intellectual property. Throughout, the discussion has identified the importance and consequence of this emphasis upon ownership of resources, not only in intellectual property, but also in biodiversity, land, and finally in self.

Through the commodification of knowledge as information to be consumed, exchanged, and traded, the market (albeit created through these very systems) continues to drive the values of politics, and thus the rights of citizens. It is this emphasis on the market and on private property rights that leads to a persistent misinterpretation of the nature of the value in those resources to Indigenous and traditional peoples, and the nature of identity itself. Misinterpreting community resources as a desire for material possession would be almost unavoidable if this emphasis were maintained.

3. Community Resources: A Declaration of Responsibility

The relationship between human rights and obligations or duties is critical to the development of community resources. As the discussion has suggested, the individualisation of human rights may inevitably alienate and obscure community, deferring the recognition of obligations to diversity that may otherwise be fulfilled through the acknowledgment of the customary laws of communities. While certain rights as freedoms may be exercised without concern for the ethical context in which they are pursued (as in the case of freedom of expression and access to traditional knowledge examined earlier), international human rights law nevertheless establishes

the link between duties and rights in the key instruments.[95] This relationship between duties and rights is critical to establishing the model of community resources in the following chapter, and demonstrates the continuing relevance of human rights to this model, despite the limitations discussed.

Article 29 of the UDHR[96] identifies the relationship between community and personal freedom that has been traced throughout this work, and which is integral to traditional philosophies of communalism and customary practice: "Everyone has duties to the community in which alone the free and full development of his personality is possible."[97] Similarly, in the Preambles to the ICCPR and ICESCR, these documents set out their provisions, "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[98]

The perceived conflict between individual rights and freedoms on the one hand, and responsibilities on the other, led to the drafting of A Universal Declaration of Human Responsibilities,[99] proposed by the InterAction Council[100] in 1997.[101] This

[95] Compare the criticism in Freeman (2002), that duties are under-emphasised: 41.

[96] Universal Declaration of Human Rights http://www.unhchr.ch/udhr/lang/eng.htm

[97] Universal Declaration of Human Rights http://www.unhchr.ch/udhr/lang/eng.htm

[98] ICCPR at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; ICESCR at http://www.unhchr.ch/html/menu3/b/a_cescr.htm

[99] The text of the Declaration can be found at http://www.interactioncouncil.org/udhr/declaration/udhr.doc

[100] The InterAction Council was established in 1983, founded by the late Takeo Fukuda, former Prime Minister of Japan. Its members are former heads of state that have previously held the highest office in their country. http://www.interactioncouncil.org/. A complete list of current members can be found at http://www.interactioncouncil.org/members/members2.html. Current members include Helmut Schmidt (former German Chancellor and current Honorary Chairman), Malcolm Fraser (former Australian Prime-Minister and current Co-Chairman), and Jimmy Carter (former President of the United States) who were all members at the proposing of the Declaration. Current members also include Nelson Mandela, former President of South Africa, and John Major, former British Prime Minister. The Council works in three main priority areas, peace and security, world economic

document[102] is particularly relevant to the principle of community resources, identifying the bias inherent in rights discourse as a result of the particular historical circumstances of international human rights law, as well as the dominance of particular religious approaches in the west:[103]

> [M]any societies have traditionally conceived of human relations in terms of obligations rather than rights. This is true, in general terms, for instance, for much of Eastern thought. While traditionally in the West, at least since the 17th Century age of enlightenment, the concepts of freedom and individuality have been emphasized, in the East, the notions of responsibility and community have prevailed. The fact that a Universal Declaration of Human Rights was drafted instead of a Universal Declaration of Human Duties undoubtedly reflects the philosophical and cultural background of the document's drafters who, as is known, represented the Western powers who emerged victorious from the Second World War.[104]

The document declares the importance of obligations and responsibilities to community integrity, as distinct from the dangers of unrestricted freedom. In this regard, the document shares much with the principles of community set out in Chapter 1 and with the criticism of unrestricted freedoms of expression as justifications for access to, and use of, traditional knowledge:

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revitalisation, and universal ethical standards. The Council develops proposals for action on specific issues, which are communicated directly to "government leaders, other national decision-makers, heads of international organizations and influential individuals throughout the world": http://www.interactioncouncil.org/.

[101] The Declaration was proposed in 1997, at which time the InterAction Council included current members Helmut Schmidt, former German Chancellor and Honorary Chairperson of the Council, Malcolm Fraser, former Prime Minister of Australia and Chairperson of the Council, and Jimmy Carter, former President of the United States, and also included Mikhail Gorbachev, Chairman of the Supreme Soviet and President of the Union of Soviet Socialist Republics.

[102] Interestingly, this document is also referred to as the UDHR, providing an appealing resonance with the rights with which these responsibilities are intrinsically related.

[103] Relevant also are groups that suggest that rights-based discourse is founded upon a problematic assumption of uniform individuals and freedoms, drawn from what was perceived to be a Judaeo-Christian construction of human rights. One group confronted this in 1993 with the Universal Declaration of a Global Ethic, adopted by the Chicago-based Council for a Parliament of the World's Religions. The document is available at http://astro.temple.edu/~dialogue/Center/kung.htm. See also material at http://www.cpwr.org/resource/ethic.pdf. The Council for a Parliament of the World's Religions can be found at http://www.cpwr.org/. See also Pannikar (1982): 75.

[104] Report on the Conclusions and Recommendations by a High-level Expert Group Meeting, Vienna, Austria (20-22 April 1997) Chaired by Helmut Schmidt. Annexed to UDHR at http://www.interactioncouncil.org/udhr/declaration/udhr.doc

> The concept of human obligations also serves to balance the notions of freedom and responsibility: while rights relate more to freedom, obligations are associated with responsibility. Despite this distinction, freedom and responsibility are interdependent. Responsibility, as a moral quality, serves as a natural, voluntary check for freedom. In any society, freedom can never be exercised without limits. Thus, the more freedom we enjoy, the greater the responsibility we bear, toward others as well as ourselves. The more talents we possess, the bigger the responsibility we have to develop them to their fullest capacity. We must move away from the freedom of indifference towards the freedom of involvement.
>
> The opposite is also true: as we develop our sense of responsibility, we increase our internal freedom by fortifying our moral character. When freedom presents us with different possibilities for action, including the choice to do right or wrong, a responsible moral character will ensure that the former will prevail.

This resonates strongly with Indigenous and traditional philosophies of communalism, explored in Chapter 1, where it was shown that community and communal knowledge founds the individual subjectivity of a person:

> The various societies found in traditional Africa *routinely accept this fact* that personhood is the sort of thing which has to be attained, and is attained in direct proportion as one participates in communal life through the discharge of the various obligations defined by one's stations. It is the carrying out of these obligations that transforms one from the it-status of early child-hood, marked by an absence of moral function, into the person-status of later years, marked by a widened maturity of ethical sense – an ethical maturity without which personhood is conceived as eluding one.[105]

Indeed, obligations to individuals may therefore include the facilitation of the necessary context in which to achieve that personhood and expression, based upon the prior collective subjectivity of community. Those obligations to individuals would therefore be realised through obligations to community resources and to the practice of custom by the community, in order that individual members may build upon the integrity and identity of the community subjectivity.

[105] Menkiti quoted in Bell RH (2002): 61. See also Menkiti (1984) and the "rites of passage" in Hardman (2000): 204-218.

The African Charter explicitly declares the significance of traditional culture and places a similar emphasis on duties in the Preamble: "Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."[106] Chapter II deals with duties, and builds upon African philosophies of community and understandings of obligations particularly relevant to the principle of community resources, including the duty of every individual "To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society."[107]

Community, and indeed cultural diversity, according to the Universal Declaration of Human Responsibilities and according to traditional philosophies of communalism, is thus fundamental to "becoming-human." Community is the foundation for the human, and the "human" is the pivotal basis of human rights. There is no one without the other, there is no human without the community. The practice of culture, the creation of traditional knowledge, and the narration of community is integral to the dignity of traditional and Indigenous groups. Human dignity is indeed a fundamental of international law as set out in the Charter of the United Nations, which seeks "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[108] In that communal attainment of dignity and personhood is fundamentally dependent upon the collective subjectivity, integrity, and identity of community, the basis for

[106] African Charter, Preamble.

[107] African Charter, Article 29(7).

[108] UN Charter, Preamble. On dignity as a normative concept, see also Schachter (1983).

international obligations to community resources becomes more certain, based upon this immutable principle of dignity enshrined in the Charter of the United Nations.

It is thus the recognition of fundamental responsibilities to cultural diversity, obligating the recognition of rights to traditional knowledge and to customary law that found the principle of community resources laid out in the following and final chapter.

Chapter 9: Community, Before the Law

Introduction

In preceding chapters, the need for a legal framework vesting the authority for management and regulation of ownership of traditional resources in the community has become clear, where management of those resources is according to customary laws. The discussion has established that conventional intellectual property regimes not only provide inadequate frameworks for the protection of traditional knowledge, given the restricting criteria for subject matter to fall within the categories of intellectual property, but also fundamentally transform the subject matter of protection in ways that make it incompatible with the interests of community.

The symbiotic relationship between community and its resources, inextricable from the knowledge and expression emanating from that community, is not readily compatible with intellectual property models which induce an objectification of knowledge in ways inconsistent with traditional knowledge development and dissemination. In other words, traditional knowledge does not readily produce a "legitimate" object for protection under intellectual property law; and maintaining intellectual property as the legitimate international model for protection will transform traditional knowledge through the authorial intervention and intrusion of western legal discourse and will continue to overlook the fundamental subject matter of protection.

Earlier chapters considered the way in which international intellectual property law is legitimated and legitimating in its narration of cultural

innovation, knowledge, and development. At the same time, it was noted that it continues to frame traditional knowledge, creating it as "art," "science," and "Culture," separating knowledge from its subjects and frequently undermining the intrinsic value of that knowledge to communities. Indeed, traditional knowledge is "illegitimate," without author, inauthentic, random, and boundless, until framed by the coherence of intellectual property. It is an idea, a method, a paradigm, without the "coherence" necessary to justify protection. It is important to refute this, and to focus the preceding discussions upon the legitimacy of community resources as a principle of international protection for traditional knowledge.

Therefore, considering the limitations of conventional intellectual property systems, together with the recognised or specified need to strive towards a *sui generis* system of rights, the model presented will clarify the subject-matter of protection beyond mere property in resources, and the vesting of legal authority in the Indigenous or traditional "community," bearing in mind the significance of communal "use." Ultimately, the goal is that of an international harmonised model based upon the recognition of the authority and capacity of "community."

Common Objects: The Global Basis for Local Protection

Throughout this work it has become clear that despite the increasing awareness that protection of the resources of Indigenous and traditional communities is required, the adherence to models derived from intellectual property frameworks is unlikely to achieve this. It has been the assertion of this work throughout the previous discussions, that protective mechanisms

must acknowledge the significance of this relationship between the community and the resources. Indeed, protection should commence from the significance of this relationship as its object, and therefore the protection of the community, through the concept of community resources.

While the creation of the schematic model of community resources presents specific concerns regarding the generalisation of diverse communities, it would be of greater concern to isolate particular communities as cultural, geographic, or racialised entities:

> [T]oward the end of challenging and resisting Empire and its world market, it is necessary to pose any alternative at an equally global level. Any proposition of a particular community in isolation, defined in racial, religious, or regional terms, "delinked" from Empire, shielded from its powers by fixed boundaries, is destined to end up as a kind of ghetto.[1]

Although the presentation of this model must never overcome the heterogeneity of the interests identified, the principle of "community" is a necessary and crucial strategy from which to commence these discussions, if any certainty and acceptance of a framework for the protection of these diverse interests is to be achieved. Indeed, the importance of achieving acceptance cannot be dismissed or ignored, without that inevitably becoming the fatal flaw in any international strategy.

Therefore, in order to consider "community" within the model of protection that this work will propose, the creation of a seemingly unreasonable generalisation of the Indigenous community as a "legal entity" must nevertheless be resisted, and yet there must be some agent in which the authority to manage traditional resources may vest. An effective and relevant

[1] Hardt & Negri (2000): 206.

model of protection must not homogenise the Indigene nor historicise "tradition", but should provide a workable legal concept for the relationship between community and the individual, towards a model for community authority and capacity with respect to traditional resources. Thus, in providing a legal framework for community authority, it is important not to suggest any fixed definition of the indexical "Indigenous community" or "traditional community" in and of itself.

The definition, if it is to be understood as one, must come from the process – a "communal" and mutual recognition between individuals, the recognition that ultimately manifests itself as "community"[2] – rather than a concept into which the individual Indigene, as and when she arises, is to be inserted.[3] Thus, community is not necessarily a physical location but a shared resource of custom and tradition from which the expression of self is possible. Nevertheless, in doing so, it must not simply become yet another imperialist project of defining and capturing community; assumptions about uniformity of "community" as "subject" must be resisted.

The model proposed, therefore, sets out to provide the framework for an international agreement,[4] promoting international relationships to

[2] The principle of self-identification as a community arguably is implicit in the concept of internal self-determination, and explicit in key international documents of Indigenous and traditional peoples, including the Declaration of Principles of the World Council of Indigenous Peoples, which maintains that "Indigenous peoples have the right to determine which person(s) or groups(s) is (are) included in its population" (Paragraph 6). See further Article 8 of the UN Draft Declaration on the Rights of Indigenous Peoples,

[3] Similarly, "traditional knowledge" is knowledge identified as traditional by the community or traditional group, rather than an artificial and nostalgic consideration of cultural heritage imposed by an external and possibly irrelevant definition: WIPO/GRTKF/IC/4/8 (30 September 2002): 10.

[4] See the compelling support for an international Treaty dealing specifically with the protection of traditional knowledge in Drahos (2004). See also the joint presentation by CWIS, the Morning Star

communities, and facilitating the local subjectification of the model within and by the Indigenous and traditional community in question. There is modelling of the agency of community within a legal framework, but this model is against constraining and recording, and therefore translating and exhausting the knowledge and identity of community. The model is not concerned with defining what makes a particular community distinct, but instead, with what relatedness makes obligations to the diversity in a specific community essential.[5] It is not for this model to "recognise" and "compel" identity,[6] but rather for communities themselves to assert authority with respect to identity and the management of resources and for the international community to recognise that assertion.[7] The bases for those assertions may lie in the legal framework, but not the responses. Rather, the concept of community resources is concerned with the application of custom by a particular community, the incorporation and realisation of local customary law within an international model of obligations to community, rather than between economies.

What is the general concept that is to operate in this legal framework? That is, what may justify and legitimise "community" as a legal principle, rather than an identity, and how is this concept to work, therefore, within an international legal context for protection?

Institute, and the Northwest Indian Applied Research Institute, on the need for a treaty on cultural property rights: CWIS et al (2000). See also Sharma A (2004).

[5] Ghanaian philosopher, Kwame Anthony Appiah identifies the importance of relations between cultures rather than refining the distinctions: Appiah (1992).

[6] Appiah (1992).

[7] Habermas (2003) explains the distinction between mere tolerance of otherness (continued to be considered inferior) and tolerance in the form of mutual recognition: "the normative expectation that we be able to live alongside those with different ethical life-styles and value-orientations is of a different nature than the assumption that we must accept the difference between religious truths or between contrary worldviews, in other words accept statements that contradict our own. In both cases, the competing beliefs have an existential thrust, that is, an impact on attitudes and practices" (12).

Community Resources and Intellectual Property

Importantly, while the proposed protection must be compatible with the international intellectual property system, the previous discussions have shown that it needs to be other than the models provided by intellectual property principles. While not a property model in itself, the concept of community resources will indeed take account of the property model already in place and somewhat pre-emptive of protective regimes. It is important to address this constraint and to devise protection that recognises it but necessarily draws upon alternative principles.

The protection of community resources, therefore, demands a system that creates rights in the community to use and manage those resources, rather than artificially making the product of an individual's creativity scarce in respect of granting that individual a monopoly over the discrete material form realised from those resources. Earlier discussions have established that communal rights in the process of tradition are necessary to ensure knowledge continues on the particular community's terms.

The necessary variable that must be addressed and which may provide the bridge between the protection of tradition and the remuneration for its commodification is the nature of that use. It is the quality of use, to which *sui generis* rights must necessarily refer. Furthermore, it is the possibility of co-existing individual rights to intellectual property that might arise in the individual artist or creator, and community rights to management of resources that must be considered. Thus, a model for protection of community governance of traditional resources will not be substituted for intellectual

property protection, but should prevail in circumstances where those rights are incompatible with each other.

Legal Parameters of Community Resources

1. Legalising Knowledge

Earlier discussions of the problematic application of state-conferred rights, contractual agreements (including bilateral agreements between states),[8] and domestic policies, suggest that protection of traditional knowledge must be facilitated and effective in a global context, that is, within an international legal framework. While international law presents the opportunity for community to act beyond the imbalance that frequently occurs in agreements at the community/state level (that is, agreements subject to domestic laws and policies), the administration of justice will often reinstate an artificial unity when conceiving of "community" and indeed the "Indigene." In seeking the creation of legal principles in order to invigorate the capacity and authority of community with respect to the protection of its traditional knowledge, there is the attending risk of the individualisation of community, traditional knowledge, and the Indigene, in order to give the concepts the phenomenological priority that appears necessary to their application within a judicial context.[9] Thus, a legal framework will have trouble conceiving of the multiplicity of community, in that it will attempt to unify and individualise community within the conventional understanding of individual rights.

[8] The impact of bilateral agreements on intellectual property protection, or TRIPS-plus, is of considerable concern, where access to compulsory licensing and other flexibilities in TRIPS are contractually abrogated in favour of promises of trade opportunities. See the recent study by Carlos Correa, commissioned by GRAIN: Correa (2004). See also Musungu & Dutfield (2003).

[9] The "phenomenologising" of the "Indigene" was consider in Chapter 6 with respect to biodiversity.

For the purposes of adequate protection and respect for community resources, the extent to which the international treaty system can proceed beyond the conventional model of state sovereignty must be examined. It is necessary to consider the way in which the international system might overcome the disempowerment of local communities at the domestic level, particularly in the context of traditional knowledge and efforts towards its protection. While the legal framework sought for this protection runs the risk of generalising the community, arguably international agreements for the protection of traditional knowledge remain the most significant tool.[10] It is necessary, therefore, to conceptualise the principles of community rather than to attempt to clarify the quality of the Indigenous or traditional interests in any single sense, towards achieving an effective legal model for protection.

2. Legitimacy

The concept of legitimacy is largely credited to the work of Max Weber, where a political regime is recognised as legitimate where indeed it is accepted and obeyed by the majority of its citizens.[11] This legitimacy does not come simply from oppression and thus obedience, but from acceptance of the political order as possessing legitimate authority. As Weber explains: "So far as it is not derived merely from fear or from motives of expediency, a willingness to submit to an order imposed by one man or a small group, always in some sense implies a belief in the legitimate authority of the source

[10] See the compelling support for an international Treaty dealing specifically with the protection of traditional knowledge in Drahos (2004). See also the joint presentation by CWIS, the Morning Star Institute, and the Northwest Indian Applied Research Institute, on the need for a treaty on cultural property rights: CWIS et al (2000). See also Sharma A (2004).

[11] Weber (1947). Legitimacy will arise through the application of rules and laws that become routine, rational, and possess legal authority, similarly to that explained in the case of intellectual property law. See also Weber (1978); Habermas (1975); Beetham (1991).

imposing it."[12] This aspect of legitimacy is of particular relevance to current developments in international intellectual property law, where self-conscious defiance of the laws is seemingly justified in terms of a greater good.[13] Whether or not this greater good is justifiable is not relevant to the question of legitimacy, which requires belief in the authority of the source of the law. Increasingly, the strengthening of intellectual property laws is producing extreme responses in citizens[14] which threaten the legitimacy of the regime. The escalating force with which those rights are sought to be upheld does nothing to revive that legitimacy.[15] Elsewhere, others question whether the creation of intellectual property in certain materials or inventions is indeed legitimate at all.[16]

Thus, just as intellectual property law was explained as a legitimated narrative of innovation, the underlying principles of community resources must be legitimised in order to be accepted. Customary law, and its interaction with the model proposed, must similarly be accepted, and the community recognised as having legitimate power and authority over its resources. Legitimacy must be bestowed upon the model, recognised in the system of customary laws, and accepted in the authority of the community.

[12] Weber (1947): 132.

[13] In a recent presentation, Vandana Shiva, argued that the laws themselves are so unjust that they must be violated for a higher moral order, and has spoken of a "commitment to disobey." In the same discussion, she described intellectual property as a rule of fear, referring to the litigation between Monsanto and Percy Schmeiser: Shiva (2004). As considered earlier, these kinds of statements raise the question of legitimacy of intellectual property, according to the political theory of Max Weber.

[14] Lessig (2004b).

[15] Earlier discussions noted the construction of piracy as a "war" and the branding of the behaviour as anti-social. See in particular Lessig (2004a) where the thesis of extremism is traced in detail.

[16] Vandana Shiva, speaking with respect to patents on plant varieties, has argued that it is necessary to ask as a society whether these patents are legitimate: Shiva (2004). See also Shiva (2001). This question of legitimate patents is arguably not in respect of the law alone, but in respect of the wider concerns of Weberian legitimacy.

2.1 Legitimacy of community resources

A crucial matter for community resources is its relationship to intellectual property law in particular, which will influence its acceptance and thus legitimacy. In order for any model of community resources to be effective, it must have legitimacy bestowed upon it by the international community. This is even more significant in the current context of international trade and commodification of resources, as distinct from being a separate subject matter for domestic governments. In other words, if the model is established as legitimate, it is entitled to be observed by the international community, triggering obligations toward community resources.

For legitimacy to be established in an international context, it is necessary to understand the grounds of legitimacy to be shared and observed by all members of that international community. Arguably, the strongest ground for the legitimacy of community resources comes from the founding documents of the United Nations, and in particular the UN Charter, which recognises the importance of facilitating the dignity of all human beings.[17] Respect for cultural diversity and community autonomy is essential for the dignity of individuals in communal cultures.

2.2 Legitimacy of customary laws

Fundamentally, for community resources to be an effective system, conventional western legal systems will be required to trust customary law, rather than disregard or presume customary law to be disorganised, fluid, and unenforceable. A system of community resources will depend upon the respect of the international trading community of states for the effectiveness and

[17] See the discussion in Chapter 8.

certainty of Indigenous and traditional individuals' responsibilities to community and allegiance to their culture; in this way, customary law will bind individuals with the requisite certainty, and the model proposed will achieve legitimacy and compliance within the international trading context. The willingness of individuals within communities to observe customary law, and to adhere to customary law, is a critical factor in achieving international legitimacy of traditional laws and practices in this model.

2.3 Legitimacy of community authority

Earlier chapters have shown that understanding the relationship between cultural expression and the land is critical to the development of the concept of "community", and to concretising the responsibility to cultural diversity through its interaction with biological diversity, but that the sense of "place" and belonging for a community must not be limited by geographical connections. This development in the concept of community facilitates not only access to rights in Indigenous and traditional resources, but also cultural diversity as well as capacity-building at the level of community, and coherence and ongoing self-recognition for cultural groups. Furthermore, in recognising the link between traditional cultural practice and community cohesion, and the natural resources of that community, biological diversity is rendered co-incident not merely with the geophysical area, or for that matter, with the artificial boundaries of nation-states, but rather with the topological development of different and overlapping social spaces of community. Thus, communities and their social and cultural development are essential to approximating a complete picture of global biodiversity because that

biodiversity is a social and political knowledge, and not merely a natural resource over which nation-states may exercise permanent sovereignty.[18]

The legitimacy of communities is also strengthened through the recognition by social and political institutions. This principle of socialisation comes from the political sociology of Jürgen Habermas[19] and refers to the "discursive validity claims" by which certain principles become legitimate norms in a society. Citizens become socialised, as it were, with certain principles that are incorporated into daily lives as routinised norms. Thus, as well as procedural legitimation through, for example, accreditation of communities by WIPO, this effective narration and legitimation of community may include education systems, media, civil society organisations,[20] and in general the normalisation and legitimisation of an increased respect for traditional systems of innovation and development. This principle of socialisation is relevant to Thomas Franck's understanding of legitimacy with respect to the right to self-determination.[21] As well as coherence, determinacy, and consistency, outlined below, Franck also considered that legitimacy would occur through symbolic validation (ritual, belief, tradition, for example).[22] Indeed, tradition, "a belief in the legitimacy of what has always existed,"[23] is one of the most important sources of legitimacy in Weber's model:

[18] Arguably, what is required is a revision of the role of consent of traditional and Indigenous communities within the provisions of the CBD, as discussed in Chapter 6.

[19] Habermas (1975): 8-17.

[20] Hurrell (2001).

[21] Franck (1999) particularly pages 35-37. See also the very useful treatment of Franck in Knop (2002): 82-86.

[22] Franck (1995): 25-46.

[23] Weber (1947): 130

> Today the most usual basis of legitimacy is the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedure. The distinction between an order derived from voluntary agreement and one which has been imposed is only relative.[24]

3. Achieving Legitimacy

The modern understanding of legitimacy is generally premised upon the legitimation of a politico-legal structure through the agreement upon and application of legal authority. It is now necessary to characterise the means by which to achieve legal certainty and determinacy for a pattern of protection based on community resources, and to consider the key elements of this international framework as a demonstrable recommendation, an actualisation of what has until this point been an abstraction.

3.1 Authenticity

In the earlier chapters concerning intellectual property, the possible role of intellectual property models in creating knowledge objects and conferring "authenticity" upon cultural artifacts was considered. In those frameworks, the nostalgic identification of "community" as the historical marker of "origin" was rejected. In the current discussion, the role of "community" might effectively secure for itself the authenticity of the "knowledge" emanating from that community as well as act as a legitimate subject according to international legal paradigms. That is, traditional knowledge will be that knowledge recognised and identified by the community as such, and therefore coming within the model of community resources. The claim by a community to knowledge may therefore trigger a presumption that the knowledge is traditional and subject to their custodianship, to be rebutted by those seeking

[24] Weber (1947): 131.

to deny this status. Communities may also seek accreditation, based initially upon their claim to self-recognition, from the relevant UN specialised agency, organisation, or programme, depending upon the body ultimately vested with authority to administer the treaty.

3.2 International Coherence and Consistency

In order to capture effectively and justly the authentic subject matter of protection in the form of community resources, an international treaty must be negotiated on several platforms, of which intellectual property law may be one aspect, but by no means the only one. Intellectual property law remains relevant and significant, as discussed here, because of the ongoing interpretation of traditional knowledge (and the term knowledge is used deliberately here in order to emphasise the concept which intellectual property regimes presume to be discrete) as able to be objectified and commodified for the purposes of international trade. However, the model of community resources makes this commodification contingent and conditional upon the consent of communities, thus recognising the intersections with the environment, land rights, the right to self-determination, food security, and rights of and to culture.

In order to realise the autonomy of individual communities, an international agreement is necessary such that international obligations to those groups are mobilised, rather than remaining anchored to models of national sovereignty and resources as mere economic assets. This will achieve a level of determinacy of community resources in a binding legal document providing coherence to the relationship between community and resources, rather than

fracturing that link through the assimilation of traditional knowledge within inadequate pre-existent paradigms.

Furthermore, in realising the relationship between nation-states and communities through the model of community resources, a legitimate and representative "identity" for community is possible. Notwithstanding the concerns with imposing identity upon groups, the schematic "recognition" of community within the international legal and political context, to be modified and adapted through implementation by states, will be according to the self-recognition of communities in specific cases. The opinion in *Western Sahara*[25] shows that the social and political organisation of peoples inhabiting a territory will constitute a coherent group for the purposes of territorial integrity. Extending these principles to the concept of community developed in this work, the tribe (or community) may be identified through self-recognition and self-assertion, without defining its capacity according to conventional models of national sovereignty. Although decided in the context of an emerging international law of decolonisation,[26] this quality of recognition according to self-governance may provide some insight into the way in which community might operate in an international agreement on community resources:

> Implicit in the interplay of sovereignty and legality, it can be argued, is the endeavour to legitimate international law through the more faithful representation and recognition of identity. Through the intermediate concept of legality, the court presented the precolonial identity of the Western Sahara as complex and overlapping, while its sovereignty was left obscure. In so far as Western Sahara was not *terra nullius* because it was inhabited by socially and politically organized tribes, the local tribes had a legal identity in

[25] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, at 12.

[26] Knop (2002): 159.

> nineteenth-century international law. The recognition as legal of ties between some tribes and Morocco, and other tribes and the Mauritanian entity, added other layers of identity.[27]

Consistency will be achieved through the coherent and consistent application of standards,[28] which may appear to present a problem in the current model given the diversity of communities. However, the diversity of subjects before the law should not defeat the consistency of the law. In the present case, consistency comes from fundamental respect for the dignity of all peoples, motivating the obligation to all communities to assert customary laws over their resources in order to express identity and maintain community integrity, in furtherance of the dignity of communities. Consistency will also be achieved through the procedural stability to be offered by an international agreement upon traditional knowledge and community resources, rather than attempts to account for traditional knowledge within intellectual property law and other regimes on an almost ad hoc basis. Indeed, the need for consistency is a powerful justification for the development of *sui generis* laws in this area, given the unique nature of traditional knowledge and its incompatibility with current regimes for property in information.

4. International Adherence

The model will also achieve legitimacy through adherence to the international legal and political system. This will be fundamental to the acceptance of the model, and will be achieved through the international agreement upon and adoption of a document debated and proposed by member states. It is recommended that the Convention for the Promotion and Protection of

[27] Knop (2002): 157-158.

[28] Chigara (2001): 111.

Community Resources (CPPCR) be negotiated to formalise fundamental respect for and obligations to cultural diversity with an applicable framework of standards of protection. This could occur within the current discussions administered by WIPO, or specifically within the World Trade Organisation, depending upon the administrative structure applied. This Convention will necessarily proceed upon platforms additional to that of intellectual property and trade. Therefore, related agencies, programmes, and organisations, including the Food and Agriculture Organization of the United Nations (FAO), the United Nations Environment Programme (UNEP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the Office of the United Nations High Commissioner for Human Rights (OHCHR), will ensure an adequately multi-dimensional approach.

Ideally, for the purposes of the CPPCR, the General Assembly will call a United Nations Conference on Community Resources, recognised as an issue of global concern for human dignity, cultural diversity, and cultural knowledge, with a view to the creation of a specific body of the Economic and Social Council, equipped to address community resources. This may take the form of another body, such as the Permanent Forum on Indigenous Issues, or a programme[29] (the United Nations Community Resources Programme or UNCRP). If the UN created a specialised agency, subject to sufficient political will, this body would be entitled to international conferences of the United Nations. This would be in recognition of the concerns over the identification of Indigenous peoples and minorities, and the problematic process of

[29] For instance, the United Nations Environment Programme was reasonably small at its inception, but grew in significance as environmental issues assumed greater importance: Birnie & Boyle (2002). On the impact of alternative measures, including trade sanctions, see Waters (2002).

hierarchising rights, implied through such classification. This is arguably necessary given the sometimes conflicting relationship between community and human rights,[30] and the complexity of community resources beyond questions of the environment, intellectual property, food and agriculture, and development.[31]

Thus, the CPPCR will arise through the normal procedures at international law in order to achieve consent of members and consultation with stakeholders, NGOs,[32] and above all, communities. Recognising the need for a truly international framework, obligations formalised in the CPPCR will be obligations *erga omnes*, making contraventions of any of the obligations to communities also contraventions against the international community as a whole.[33] Thus, any state would be entitled to seek enforcement of obligations to communities, the details of which will be considered shortly, assuming collective global responsibility to cultural diversity, including the possible application of trade sanctions against goods illegitimately containing traditional knowledge.[34]

It is vital that nations are not free to contract upon community resources (as in bilaterals and free trade agreements) where it may be possible effectively to

[30] Chapter 8

[31] The multi-dimensional basis for protection of community resources has been considered throughout this work.

[32] The increasing relevance and importance of NGOs and civil society in international trade and the environment provides a significant model upon which to build the relationship between communities and NGOs in the present model: Mason M (2004); Lacarte (2004).

[33] Ragazzi (2000).

[34] This would be similar to the case of international intellectual property law, where individuals may claim and contract upon rights, but States may nevertheless seek sanctions or access the WTO dispute settlement mechanism, where member States are seen to be in breach. Thus, the consent of communities and the capacity of communities to enter agreements with respect to their knowledge remain important aspects of the model.

contract out of obligations to community resources.[35] Community resources must be recognised as minimum standards, which, like TRIPS, could only be strengthened by bilateral agreements, and not compromised.

5. International Determinacy

In the interests of determinacy, a clear and general legal principle of community must be achieved, but not at the expense of the diversity of communities to whom this would apply. For this reason, the model proposed suggests procedural mechanisms by which to achieve this determinacy, legal certainty coming from the application of such procedures to the determination of community; but the assertion of community, and the identification of a single member, will necessarily arise through recognition.

A Model for Community Resources

1. Cultural diversity and dignity

Fundamentally, the concept of community resources recognises obligations to cultural diversity and dignity through the acknowledgment of and respect for traditional and Indigenous communities. According to the model of community resources, communities are entitled to manage their resources in observance of customary law, communal traditions, and practice.

2. Community and Resources

Assertion by a community as community will lead to a rebuttable presumption that the claim to community status is valid. Similarly and necessarily, all "resources" of a community integral to its self-identity, freedom of expression, coherence, and dignity must be recognised in the first instance as community

[35] Correa (2004).

resources, as identified by the community. Such a claim to resources, within this model, will also raise a rebuttable presumption.

These presumptions may then be rebutted by the competing claim (considered in more detail below). It will not be required of communities to assert and prove status, but will be a procedural burden upon those interests seeking to claim subsequent intellectual property rights or access to genetic resources, for instance, where the taking has already occurred without the free and prior informed consent of the community, or where such consent has already been refused.. The ability to challenge a claim to community is a necessary aspect to ensure the fairness and therefore legitimacy of this framework. As outlined later, a valid claim to community will not defeat a challenge to the presumption of traditional knowledge, which may be overcome where the proportionality of harm is not made out. Thus, a claim to community and to community resources may be constructed as follows:

- Assertion of community by community – self-recognition will trigger a presumption in favour of community.
- Assertion of resources by community – recognition of community and claim by that community to the knowledge in question will trigger a presumption that the knowledge is traditional.
- Rebuttal of presumption by competing claim – the assertion of community and of resources may be rebutted by the parties seeking commercialisation of or access to knowledge (on the grounds set out below).
- Proportionality – the application of equitable principles to determine the validity of the claim (whether to community or to traditional knowledge).

2.1 Presumption

Those seeking access to, or commercialisation of, community resources may rebut the validity of the claim made by a particular community. This may be a rebuttal of the claim to community (and therefore necessarily a rebuttal of the presumption that the knowledge is traditional), and/or a rebuttal of the presumption of traditional knowledge. It is necessary for a just and acceptable international law that this be possible. The rebuttal of a claim will depend upon an assessment of proportionality. It is not anticipated that this aspect of the model will involve the application of declarations that the community is not a community, or that the knowledge is not traditional, where a rebuttal of a claim is successful. In other words, the process will involve a balancing of interests according to equitable principles of international law. It is not claimed here that equity is the source of the law, but that equitable principles necessarily inform the decision as to competing interests.[36]

Parties may seek to rebut the application of the presumption of community through evidence discrediting the claim to community or relying upon equitable principles to determine harm in a particular case. In each and every instance, this must be determined on a case-by-case basis, having regard to the diversities of communities and the validity of all claims. If accreditation is provided under the applicable framework, and the community has achieved accreditation, the presumption of community will be very strong. The argument against the presumption may have reference to, inter alia:

- **Tradition and history**

[36] Equity is recognised as appropriate to the process of decisions in international justice according to Jenks (1964): 316-427. See, for instance, the Fisheries Jurisdiction Case (United Kingdom v Iceland) ICJ Reports (1969) 3 at 46-52. See also Rann of Kutch (India/Pakistan, 1968): 7 ILM 633 (1968).

The principle of long-standing ancestral and cultural cohesion and tradition was developed early in this work[37] and is applied here. Where a community assumes cohesion (such as a modern community) that is understood apart from a responsibility to tradition[38] – in other words, not characterised by holistic and shared cultural development, ancestral ties, kinship, religion, and belief systems – this may deny the validity of its assertion as community for the purposes of community resources. This clarification of "traditional" communities is necessary in order to characterise the particular quality of the concept of community resources, as distinct from other embodiments of community. This does not deny traditional communities the capacity to develop and evolve in a contemporary setting, however. Therefore, arguments of "modernisation" of community will not defeat the presumption.

- **Recognition of Community**

  The community may not be recognisable as such to the "outside" world; however, this will not be sufficient to rebut the presumption. For instance, the remoteness (physical or otherwise) of community should not defeat its claim. Indeed, this lack of recognition may in fact assist a community's claim in that access to its traditional knowledge in the form of misappropriation of cultural symbols, for example, may be more damaging to its infrastructure and identity, resulting in greater harm.

- **Locality – Culture**

[37] See in particular the discussion in Chapter 1.

[38] As discussed, tradition is an important basis for the legitimacy and stability of the model of community resources.

As developed earlier, locality/territory is asserted through culture and cultural practice. In that misappropriation of culture may occur on an international level, the place of dissemination of that misappropriation may not necessarily be relevant. For instance, the appropriation and/or mis-use of traditional knowledge in one part of the world may be argued to have minimal effect on a community in another part of the world. It may be that place is relevant to an argument against the presumption, but this is unlikely given community capacity to cohere despite geo-historical displacement. Furthermore, it must never be considered a sufficient reason for the presumption to be rebutted. It is more likely to be relevant when read in conjunction with other factors towards recognition.

As for the rebuttal of the presumption of community, parties may also seek rebuttal of the presumption of resources ("traditional knowledge"). Other factors relevant here may include:

- **Recognition of Resources**

  Related to recognition of community, the identifiability of the knowledge may be a factor in rebutting claims to restrict access to that knowledge. Relevant here will be the importance and significance of the knowledge to broader notions of self or community. While documentation may be relevant to this factor, it would not be a requirement for recognition within the model. The quality of recognition will not only involve that recognition "outside" the community (contributing to the resilience of the knowledge against transformation through use), but also the recognition within community and the preservation of that recognition according to

customary law, which may preclude the disclosure of knowledge through documentation.

- **Stability of Resources**

  Relevant to this question will be the resilience of the particular knowledge against exhaustion through cultural transformation. For instance, it may be difficult for Indigenous Australians to restrict the manufacture of didgeridoos by non-Indigenous Australians, except perhaps on other grounds such as where non-traditional products are passed off as genuine Indigenous articles. On the other hand, claims to restrict the reproduction of certain ancestral symbols and designs upon those didgeridoos may in fact be successful within this model.

  This question is of course relevant to community also, in that the identifiability of the traditional knowledge may also lead to the impersonation, as it were, of the community. In this way, then, non-traditional use may offend and damage the community, and may de-value the traditional knowledge to that community. This aspect is related to the general principle of proportionality and harm, outlined below.

2.2 Free and Prior Informed Consent

Communities must have the authority and capacity to deal with their resources as they choose. It is not appropriate that the model charge national governments with the authority to consent and manage traditional knowledge on behalf of communities.[39] Therefore, the principle of free and prior informed

[39] See IPCB (2004b) and the rejection of idea of "competent national authorities" and the conferral of the role of gatekeeper upon the State.

consent is fundamental to this model and an essential element of legitimate use or appropriation. Communities must be entitled to consent to the use of their knowledge as appropriate and under conditions to be determined by the communities and in accordance with their customary laws.[40] This will facilitate commercialisation where appropriate to the shared values of communities. If a legitimate community chooses to commercialise aspects of its knowledge, that use is *a priori* traditional in that it has been determined by the community.

Achieving free and prior informed consent nevertheless presents several difficulties, not least of which includes identifying the community and/or the representatives from whom to obtain consent.[41] While provision for accreditation of communities may assist this process, the lack of accreditation should not prove an administrative burden by which communities are denied autonomy with respect to resources. Fundamentally, this should not preclude the negotiation of protection upon the concepts developed here at a schematic level.

The application of this principle within the present model would include a duty of those seeking to use what they ought reasonably to believe to be traditional knowledge, or to access natural resources, to make reasonable efforts to ascertain the relevant community. Where a community subsequently challenges the taking of resources, and free and prior informed consent cannot

[40] The understanding of free and prior informed consent as consent in accordance with cultural and customary laws of those communities from whom the consent is sought operates in laws concerned with access to resources, including the Philippines Republic Act 8371 on the Rights of Indigenous Cultural Communities and Indigenous Peoples.

[41] For instance, see the discussion of the problems with identifying the "providers" of resources in Tobin (2002): 299-300.

be shown, those seeking to uphold their appropriation of resources will be able to demonstrate that such reasonable steps have been taken. Where such steps have been taken, no damages may be due to the community; however it may be a practicality of the law that benefits are shared and/or resources returned where appropriate.[42]

Free and prior informed consent will be provided according to the shared values of the community and may include the following elements:

- Fully informed as to the proposed use of traditional knowledge (crucial to the decision to consent, based on considerations outlined below).
- Consideration of conditions of cultural appropriateness of use.
- Limited to single use and not to secondary uses where further consent may be required (for instance, for trade mark use where the trade mark registration may seek the inclusion of new categories, the community's consent may be required for the mark to be applied to those additional categories).
- Ongoing assertion of community resources, where identification, attribution, and acknowledgment of community may be required (similar to the principle of moral rights in copyright law).

2.3 Validity of Claim – Consent

Where the community is established and knowledge is traditional, and where use may cause harm without consent, both parties may nevertheless challenge the validity of a claim with reference to whether or not the free and prior

[42] It may also be possible under the Treaty, for example, that contracting parties *may* provide for invalidation of the intellectual property rights (discussed further below).

informed consent of the community in question was obtained. As will become clearer later, consent provided in another instance will not necessarily extinguish rights, and similarly disclosure will not be applicable. Therefore, the free and prior informed consent must be applicable to the particular taking and use in question.

Where free and prior informed consent can be shown, subsequent intellectual property claims will succeed on the basis of a legitimate entitlement to the knowledge in question. Where consent is shown to be invalid (for reasons of lack of information, unconscionability, and so on) the taking of traditional knowledge will also be invalid. Therefore, any subsequent rights to intellectual property in that knowledge, for example, will be illegitimate and will be revoked. This would require consistency with international intellectual property laws, through the applications of exclusions based upon the misappropriation of traditional knowledge.

It is accepted that the application of consent within this model requires the identification of those entitled to grant such consent, which may present problems in particular instances. Nevertheless, this does not defeat the conceptual bases for community resources presented in this model, which are important to establish in this preliminary schematic form.

2.4 Proportionality - Harm

Where parties are unable to rebut the claim to community or the claim to traditional knowledge, they may appeal to the proportionality of the claim, and the question of harm upon the community. Such arguments would make reference to some of the grounds set out above in section 2.1. In particular, the

determination of harm will draw upon the balancing implied by the consideration of principles such as the freedom of expression of community, and the means necessary for that expression.[43] This is related to questions regarding the use of traditional knowledge and the potential degradation or transformation of its cultural value and integrity. For example, the wearing of traditional Sámi costume by non-Sámi tour guides, promising an "authentic" experience, has been described as causing great offence to Sámi people and indeed undermining the self-identity and self-worth of the young members of the Sámi community in particular.[44]

3. Extinction of Rights

Community custodianship over resources cannot be extinguished by subsequent creation of intellectual property rights, under the concept of community resources. Therefore, where a community consents to traditional knowledge being used, the model may require that this in no way extinguishes their rights to that knowledge. Therefore, consent in one instance will not justify subsequent open access, and the model may require fresh consent for every use of a particular aspect of traditional knowledge. While blanket consent may be easier in its practical application, the argument for fresh consent acknowledges the importance of the use of knowledge to the decision to grant consent by the community. Blanket consent cannot anticipate the

[43] Chapter 5.

[44] Ahren (2004). See also the discussion at http://www.itv.se/boreale/samieng.htm

many uses to which knowledge may be put once it is appropriated in this way.[45]

4. Enforcement

4.1 Administration of Treaty

As discussed, the principle of community resources requires an international Treaty negotiated on a range of platforms, not merely within intellectual property law (CPPCR). Ideally this would be administered by a new body dedicated to community resources, such as the United Nations Community Resources Programme (UNCRP). This body would be committed to community, cultural diversity, and traditional knowledge.

4.2 International Court of Justice

Disputes could be settled within the International Court of Justice (ICJ). Although the ICJ would be limited to states, the CPPCR could also entitle individuals recognised as members of communities, or communities, to petition the UNCRP, where their rights have been violated. The UNCRP could then provide a recommendation to the ICJ that it hear the claim. This would be similar to the optional protocol of the ICCPR, except that ideally it would be part of the original CPPCR, and not optional to signatories. Alternatively, accredited communities could be granted status as international organisations, and therefore standing to address a violation of community resources as a principle of international law. While the UNCRP would be able to refer legal questions to the ICJ for advisory opinions, and recommendations on behalf of

[45] Nevertheless, this ideal does not preclude the granting of blanket consent where appropriate. For instance, the conditions and terms of the appropriation and use may be qualified in agreements to allow for blanket consent.

communities, states could refer cases of the violation of community resources to the ICJ for decisions.

States may be reluctant to accept the compulsory jurisdiction of the ICJ, a problem which besets all international treaties, and therefore the uptake of the CPPCR might be compromised if this were mandatory. If for reasons of agreement this must be made a voluntary provision, other mechanisms, including economic sanctions and withdrawal of rights of participation, might apply.[46] Implementation of the agreement at the domestic level will of course be critical here, and the resistance of countries like the United States would severely compromise its efficacy as an international framework.

4.3 WTO Dispute Settlement Procedures

Strategically it may be important to include community resources in the agenda on international trade, on the basis that it is through international trade that the greatest injustices against community resources occur. This will also lead to access to WTO dispute settlement procedures. If an appropriate UN body is established, it must have the authority to act on behalf of communities where necessary.

4.4 Conciliation and Arbitration

The Treaty may also include provisions for conciliation and arbitration. This may include the appointment of an arbitration panel or referral to a particular international body (such as the hypothetical UN specialised agency, the International Community Resources Organisation).

[46] For the relevance of such measures in international environmental law, see Birnie & Boyle (2002).

5. Community Resources and Interaction with Other Laws

5.1 Community Resources and Intellectual Property

Given the importance of traditional knowledge as an issue of international trade and intellectual property, considered throughout this work, it is necessary to characterise the way in which the system may interact with intellectual property laws and rights.

As noted earlier, community resources are different from information as such because they can be exhausted through cultural transformation and offence. Therefore, community resources are not about trade in information, but about the practice of knowledge and the dignity and identity of communities. Nevertheless, in the application of intellectual property laws, community resources can be rendered information for the purposes of trade. The effect of successful oppositions by communities and the invalidation or absence of consent must therefore be considered, in the context of intellectual property that may include resources improperly taken.

Some of the ways in which the two systems interact have arisen in the discussion above, in respect of defeating claims to community resources. For instance, where traditional knowledge has been shown to be obtained through misappropriation, the creation of private intellectual property rights could be invalidated. This would require consideration of the relationship of the implementation of the CPPCR with the TRIPS Agreement, to avoid breach of

obligations under TRIPS, or possibly waiver or amendment through the Doha negotiations.[47]

With respect to copyright material, as an automatic right, nothing in the CPPCR could prevent copyright arising, but it may impact upon the exercise of those rights. Indeed, the copying of sensitive cultural material, recognised as resources (according to the procedure described above), may constitute substantial copying leading to the invalidation of copyright in that material.[48] The protection of community resources may also be recognised as coming within exclusions provided in Article 27(2) (patents and *ordre public*), to be clarified at the national level. Similarly, trade mark protection can be denied by contracting parties under Article 15(2) of TRIPS, in accordance with the exclusions provided in the Paris Convention.[49] Following the example set by New Zealand, discussed earlier, the precedent for exclusion from trade mark protection, or registration qualified by consent, seems to have been established.

In addition to communities refusing to provide consent to parties seeking to use knowledge, communities may also bring claims to defeat intellectual property rights that have been acquired in their knowledge, based upon the concept of community resources (and the application of the equitable principle

[47] Gervais (2003b) suggests that it is "quite unlikely that the Doha negotiators will agree that the current TRIPS framework is simply discriminatory and as a result adopt a sweeping *sui generis* right to protect all forms of traditional knowledge" (63).

[48] See for instance the Australian decision in *Milpurrurru v Indofurn Pty Ltd* (1995) AIPC ¶92-116 at 39,069 per Von Doussa J, where a small area of copying was nevertheless held to be substantial (qualitatively) because of the cultural specificity. This notion of substantial copying by virtue of the critical nature of the copied material to community resources (or the "work" of community) may be crucial to the negotiation of copyright protection.

[49] The Paris Convention for the Protection of Industrial Property was concluded in 1883 and last amended in 1979. Prohibition or invalidation of registration is provided in Article 6*bis*(1) (confusion) and Article 6*ter* (State Emblems, Official Hallmarks, Emblems of Intergovernmental Organisations).

of proportionality in determining the validity of refusal to grant consent or the validity of the claim against access or use).

Also of importance here will be the actions of individual members of communities. It may arise that an individual member will remove traditional knowledge and assert intellectual property rights. Where that use is with the valid consent of the community, or is not necessarily in conflict with community or traditional use, or does not cause significant harm (based upon equitable principles of proportionality), then there will be no conflict between community resources and intellectual property. However, where that use constitutes culturally inappropriate removal of knowledge outside the community, then this individual may be subject to the same claims described earlier. Possibly more importantly, that individual will also be subject to retribution for actions under customary law, including possible exclusion by the community, and loss of recognition by the community. Indeed, the very actions of that individual are, by definition, actions against membership of, and recognition by, the community. The influence of these sanctions against the individual under customary law should not be underestimated, and should not be interpreted as unenforceable, uncertain, or without weight. In other words, the legitimacy of customary law must be respected.

The exclusion, from intellectual property protection, of material based upon the misappropriation of traditional knowledge may require amendments of existing laws in order to include community resources (where made out according to the process described above) as an exemption to the protectability of otherwise valid intellectual property.

5.2 Community Resources and Biodiversity

The critical way in which the concept of community resources interacts with biodiversity, and the CBD in particular, is that it will require nations to obtain the consent of communities before being able to contract with other nations. This may require review of the provisions of the CBD to indicate genuine community consent regarding access to biological and genetic resources. That original consent may be accompanied by appropriate agreements concerning remuneration and benefit-sharing, and would be governed by the principles of the Treaty on Community Resources. Therefore, in acting according to the CBD, the nation must also observe its obligations under the Treaty on Community Resources, before it may legitimately contract on national resources.

5.3 Community Resources and Rights to Land

It is encouraged that the principle of community resources is recognised in the context of rights to land. As applied, subsequent private ownership to land would not exhaust the community's rights to resources in that land, subject to exceptions and the determination of harm, as outlined above. Therefore a community would continue to be entitled to its cultural knowledge and traditional practices associated with that land, where native title or rights to land are recognised. Under the system of community resources, successful native title rights would include modern traditional use, including mineral rights and other evolutions of the contemporary community compatible with its traditional and shared values, and would not be limited to the uses of resources at the time of colonisation.

5.4 Community Resources and Human Rights

Fundamental human rights to bodily integrity and safety are not compromised or qualified by this model. Nevertheless, where rights to freedoms of speech, self-expression, and so on are invoked, there may be important interactions with the principle of community resources. As in the balancing of other rights and freedoms, community resources will be similarly relevant in deciding, for example, the appropriate exercise of one's freedom of speech. Earlier considerations of the freedom of expression identified individual self-expression in traditional communalism as being intrinsically linked to community and to social worth and subjectivity developed through community. It is here that the fundamental principles of responsibilities are significant in understanding the way in which freedoms are asserted in an ethical context, ultimately informed by the principle of community resources set out in this work.

Ultimately, the relationship between community resources and human rights is not one of conflict; indeed, human rights principles of self-determination and the right to participation continue to underscore the legitimacy of community resources.

The model of community resources, developed throughout this work, emphasises the dignity of Indigenous and traditional communities and the fundamental importance and urgency of the recognition of "community." For protection of traditional knowledge to be coherent, consistent, and just, agency

must vest in the community and genuine respect for cultural diversity must be realised.

Conclusion: Community, Once and For All

> Henceforth the question should be the community of being, and not the being of community. Or if you prefer: the community of existence, and not the essence of community.
>
> Jean-Luc Nancy, "Of Being-in-Common."[1]

The implicit question throughout this work has not been to define and constrain community, to provide the "essence" of community; but rather, it has been how to recognise the self-assertion of communities within an international legal framework of community resources. How does a legal paradigm, which presents definitions upon which a principled decision may be made, answer this question?

In this model, community – enlivened by the recognition of the belonging of each other amongst those within the community –is the central performer in the customary management of traditional knowledge and resources. The implementation of the concept of community, if it is to be relevant to Indigenous and traditional groups, cannot involve its definition as an essential and singular notion, but must evolve and feature as a function of the interaction between tradition, custom, and social life as instantiated by the members of the community.

With increasing international discussion towards sustainable development, capacity for innovation, and cultural diversity, community identities are now entering into prominence within the political and economic structures of the states that cooperate in

[1] Nancy (1991a): 1.

the international trading structure. Thus, the "community," not a mere collective, becomes the subject of political, cultural, and public interest. Community is to be protected against threats to remove the management of resources, management which is arguably integral to that community, to the private sphere of exclusive monopolies. Unless the opportunity is provided to assert difference as a community, the unique claims of Indigenous and traditional groups with respect to resources could be negotiated away, and the international obligations enriched by these inclusive systems of custodianship may be inconceivable.

At this very important historical juncture, international discussions must be broadened beyond a preoccupation with efficient trade in information; they must engage with the question of community, once and for all.

Resources

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